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JOHNS HOPKINS UNIVERSITY STUDIES

IN

HISTORICAL AND POLITICAL SCIENCE

HERBERT B. ADAMS, EDITOR

History is past Politics and Politics present History.—*Freeman*

EXTRA VOLUME

IV

"But when several families are united, and the association aims at something more than the supply of daily needs, then comes into existence the village . . . When several villages are united in a single community, . . . the state comes into existence . . . Seeing then that the state is made up of households, before speaking of the state, we must speak of the management of the household."—*Aristotle (Jowett)*.

"Wherever the primitive condition of an Aryan race reveals itself either through historical records or through the survival of its ancient institutions, the organ which in the elementary group corresponds to what we call the legislature, is everywhere discernible. It is the Village Council . . . From this embryo have sprung all the most famous legislatures of the world."—*Maine*.

"Die Hunderte ist, insofern ihr eben ursprünglich Zahlverhältnisse zu Grunde liegen, nicht so natürlich und frei erwachsen, wie die Dorfschaft auf der einen, die Landschaft auf der andern Seite. Sie hat etwas gemachtes, mechanisches an sich. Sie ist eine Abtheilung des Volks und Staats für bestimmte Zwecke."—*Waitz*.

"If the shire be the ancient under-kingdom, or the district whose administrative system is created in imitation of that of the under-kingdom, the shiremoot is the folkmoot in a double sense, not merely the popular court of the district, but the chief council of the ancient nation who possessed that district in independence, the witenagemot of the preheptarchic kingdom."—*Stubbs*.

"Kenner des englischen Staatswesens sind heute wohl einverstanden, dass es nicht ausreichend ist immer nur das Parlament im Auge zu haben; dass die Darstellungen der Constitutional Law in Blackstone, seinen Nachfolgern und Bearbeitern unvollständig sind und Haupttheile der Verfassung gar nicht enthalten."—*Gneist*.

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AN INTRODUCTION

TO THE

Local Constitutional History

OF THE

UNITED STATES

BY

GEORGE E. HOWARD

Professor of History in the University of Nebraska

Vol. I

Development of the Township, Hundred, and Shire

BALTIMORE

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PREFACE.

Since the appearance of Freeman's *Comparative Politics* the theory of an English local constitution whose origin is coeval with the origin of the race has become familiar to every scholar. In that work the real extent and the real limitations of our common Aryan heritage were first disclosed. Already an extensive monographic literature, every day increasing, bears witness to the high value set upon the study of local institutions.

But it is a noteworthy fact that local constitutional history, as a unity deserving of sustained and comprehensive treatment, has as yet found few expounders. Bishop Stubbs, it is true, in his account of the higher organism has assigned to the lower its proper space and rank. George Waitz has rendered a similar service for Germany; and the evolution of the mark, village, and other communities on the Continent, has been described at great length by George L. v. Maurer. But the treatise of Dr. Gneist is the only work of first rate importance which has yet been devoted exclusively to the history of local self-government in England. This book, however, is a practical demonstration that the history of the local constitution, for weight and dignity, may rightly take its place on a level with that of the state itself.

No compendious treatise on the development of local institutions in the United States has yet appeared. Indeed, until recently, the attempt to produce such a work, if not premature, would at least have proved extremely difficult. Even now, notwithstanding

the rapid progress of investigation during the past few years, I am oppressed by the consciousness that this effort to perform the task is far from being entirely satisfactory. And it must have been unsatisfactory in some degree, though undertaken by hands much more skilful than my own. For the field is so vast, the differentiated organic forms and administrative devices so various, that an ideal general history cannot be written until every part of the territory has been minutely explored by separate investigators.

This book is intended simply as a general introduction to the study of our local constitution. It is not designed to render unnecessary the special treatment of the subject for any locality. On the contrary, here is a rich field in which many laborers may find profitable employment. The institutional history of every state—not merely an analysis of its present civil government—ought to be written. And if it were written from a full mind, competent to bring it into its proper relations with the past and the present on both sides the ocean, it would constitute a most valuable and not uninteresting addition to our literature.

To all who have assisted me in any way during the progress of this work, I desire to express my thanks.

Among those who have given me information in reply to letters of inquiry, I wish particularly to acknowledge the kindness of Hon. P. F. McClure, Commissioner of Immigration and Statistics for Dakota, Hon. Michael Shoemaker, Chairman of the Committee of Historians of the Michigan Pioneer and Historical Society, and Mrs. Stephen B. Weeks, of Chapel Hill, North Carolina. For the loan of valuable books, I am indebted to Messrs. S. T. Viele, of Buffalo, Charles L. Smith, Instructor in History at the Johns Hopkins University, R. C. Davis, Librarian of Michigan University, Addison Van Name, Librarian of Yale College, and Mellen Chamberlain, Librarian of the Boston Public Library. Through the courtesy of Mr. Charles M. Andrews, I have had the advantage of reading the manuscript of his forthcoming

monograph on *Anglo-Saxon Manorial Life*, a thorough study of the subject from the sources.

I am under obligations to Mr. S. L. Geisthardt and to Mr. Jesse H. Holmes for the investigation of certain local questions respectively in Connecticut and Virginia. And for similar favors, I am indebted to my colleagues Instructor T. M. Hodgman and Professors L. A. Sherman and H. W. Caldwell. Mr. H. H. Wilson has repeatedly and without stint given me the benefit of his wide and accurate knowledge of American law and institutions. Judge S. B. Pound, likewise, has aided me with information on legal topics.

To Dr. A. G. Warner my grateful acknowledgments are especially due. Without his scholarly assistance, freely rendered in countless ways, the difficulties of my task must have been greatly enhanced. Dr. Herbert B. Adams has courteously placed many rare volumes at my service; and, it is but just to add, I have derived much advantage from the suggestiveness of his various monographs on the origin of New England institutions.

LINCOLN, *March* 19, 1889.

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Errata.

Page 12, *note* 2, for "proprius" read "proprios."

Page 62, *note* 3, seventh line, for "*Mass. Col. Rec.* II" read "*Mass. Col. Rec.* IV, Part I."

Pages 183–4, for "1792" read "1692," and for "1797" read "1697."

Page 222, for "1761–2" read "1661–2."

Page 230, for "1869" read "1870": the date when the conditions prescribed by Congress were accepted.

Page 258, fourth line, for "district" read "distinct."

Pages 338 and 360, for "1791" read "1691."

PART I

THE TOWNSHIP

THE TOWNSHIP.

CHAPTER I.

EVOLUTION OF THE TOWNSHIP ORGANISM.

I.—The Clan.

One of the most interesting and important results of the study of comparative sociology is the disclosure of the fact that the family and not the individual was the unit of ancient society. Among all the races of antiquity "the constitution of the family was the basis and prototype of the constitution of the state."[1] But the ancient or patriarchal family was something quite different from the modern. In the first place, it was a much more extended group, embracing under the headship of the eldest valid ascendant all agnatic[2] descendants and all persons united to it by adoption, as well as clients and other dependants.[3] Again the authority of the house-father

[1] Marquardt, *Das Privatleben der Römer*, I, p. 1; cf. also Schrader, *Sprachvergleichung und Urgeschichte*, 394–5; Maine, *Village Communities*, 15 ff.; Spencer, *Principles of Sociology*, I, 705–45; II, 451–71; Gilbert, *Handbuch der griech. Staatsalterthümer*, II, 302.

[2] Agnates were those who could trace their kinship through males: the offspring of married daughters were excluded, as belonging to another family: Maine, *Ancient Law*, p. 56, 141 f.; Hadley, *Roman Law*, 130 ff.; Puchta, *Institutionen*, II, 17 ff.; Lange, *Römische Alterthümer*, I, 211 ff.; Muirhead, *Hist. Int. to Private Law of Rome*, 43 ff., 122 ff.

[3] Clients, servants, slaves, and even those admitted to the hearth as guests, by observance of the proper rites, were according to the primitive conception members of the family group and sharers in its *sacra*. Hearn, *Aryan Household*, 73, 108; Fustel de Coulanges, *Ancient City*, 150; Maine, *Ancient Law*, 158.

was of a most despotic character, though exercised during his entire lifetime over even the married sons and their wives and children: the patriarch's arbitrary commands were originally the only forms of law.[1] But the family as thus organized was already a mere survival, or found only among uncivilized races, when noticed by the earliest observers. Thus Homer says of the Cyclops: "They have neither assemblies for consultation nor *themistes*,[2] but everyone exercises jurisdiction over his wives and his children, and they pay no regard to one another."[3] And probably the poet has here ascribed to the Cyclops the characteristics of savage tribes with which the Greeks were acquainted.[4] The theory that the family is the type of political organization is by no means of recent origin. It is clearly set forth, and the process of expansion accurately described by Plato and also by Aristotle, who base it upon their own observation, "both among Hellenes and barbarians," and each illustrates it by reference to the passage from Homer.[5]

[1] The absolute power of the house-father was an Aryan characteristic. Schrader, *Sprachvergleichung und Urgeschichte*, 386 ff. Among the Romans, as is well known, the father had *jus vitae necisque*, in respect of his children, could sell them into slavery, and even sons who filled the highest offices of state could originally own no property. Puchta, *Institutionen*, II, 384 ff; Scheurl, *Institutionen*, pp. 271 f.; Maine, *Ancient Law*, 133 f.; Hadley, 119 f.; Clark, *Early Roman Law*, 25. The power of the father to expose female infants was a great evil during the early empire: Capes, *Age of Antonines*, 19 f. See further Muirhead, *Hist. Int. to the Private Law of Rome*, 27 ff., 118, 222; Lange, *Römische Alterthümer*, I, 112 ff.

[2] On the *themistes*, or inspired commands of the hero-king, handed down to him from Zeus by Themis, see Maine, *Ancient Law*, Chap. I.

[3] Odyssey, Book IX, ll. 106 ff., as rendered by Sir Henry Maine, *Ancient Law*, 120. Cf. Odyssey, Book VI, ll. 5 ff.: Bryant's Translation, I, 144, 215–16.

[4] "It may not perhaps be an altogether fanciful idea when I suggest that the Cyclops is Homer's type of an alien and less advanced civilization," Maine, *Ancient Law*, 120. But see Freeman, *Comparative Politics*, 379, note 20, who regards this as an exceptional case.

[5] Plato, *Laws*, Book III, 680–81: Jowett, *Dialogues*, Vol. IV, p. 209; Aristotle, *Politics*, Book I, 2: Jowett, Vol. I, p. 2 ff.; both also cited by Maine, *Early Law and Custom*, p. 196.

The family, then, was the germ from which have been evolved, as in concentric circles, all the forms of political organism.[1] By process of natural growth a certain number of families became united in a clan, the Roman *gens* or the Ionic *genos*. In like manner, in course of time, a union of gentes formed a *phratria* or *curia;* and a gathering of phratries or curies formed a tribe,[2] famous illustrations of which are the *tribus* of early Rome—Ramnes, Tities, and Luceres—and the Ionic *phulai* of the Homeric age—Geleontes, Hopletes, Aigikoreis, and Argadeis.[3] Each of these groups, in ascending series, must be regarded as successively representing a newer and more enlarged conception of the state: the lower being retained as subordinate members of the higher organism.[4]

But it is the clan or gens with which we are here directly concerned. The point to be noticed first of all is that already when history dawns, it had become the starting point of political life; the family was no longer employed directly as a member of the state. The gens, like the family which it

[1] In general on the patriarchal family, see Schrader, *Sprachvergleichung und Urgeschichte*, 379–95; Fustel de Coulanges, *Ancient City*, 111 ff.; Maine, *Ancient Law*, Chap. V; Hearn, *Aryan Household*, Chaps. III, IV; Letourneau, *La Sociologie;* Lange, *Röm. Alt.*, I, 102 ff.

Morgan, *Ancient Society*, pp. 383–508, traces the growth of the family from original promiscuity through various different forms before the monogamian is reached. See also McLennan, *Studies in Ancient History* for the theories of promiscuity, endogamy, exogamy, and marriage by capture. These two works are discussed by Maine, *Early Law and Custom*, Chap. VII, and by Lubbock, *Origin of Civilization*, pp. 50–113; McLennan is criticised by Herbert Spencer, *Principles of Sociology*, Part III, and by Morgan, pp. 509 ff. See J. D. Mayne, *Hindu Law and Usage*, pp. 33–87 for much curious information on the family customs of India. Also Schrader above cited.

[2] According to tradition, among the Ionians, 30 families formed a *genos*, 30 *genê* a *phratria*, and 3 *phratriai* a *phulê* or *tribe*. Schömann, *Antiquities*, 317, 364; Grote, III, 52–3; Wachsmuth, I, 342 f.

[3] See the comparative table of groups in the order of their expansion: Schrader, *Sprachver. und Urgesch.* 394; Müller, *Handbuch der klassischen Alterthumswissenschaft*, IV, 17–22; Schömann, *Athenian Const. Hist.*, 3–10.

[4] The curia or phratria, however, as we shall see was a more artificial group and discharged more special functions. See Chap. V, 1.

superseded, was therefore a state in miniature; and when it, in turn, expanded into higher groups, it nevertheless continued to survive as the political unit. But what renders it of surpassing interest for our present purpose is the fact that in it we behold the embryo or prototype of the township. The latter, in the modern territorial organization, occupies in one form or another the same relative place which the former held in the tribal constitution of early Aryan society. But, at first glance, there is little in the form of the primitive institution to remind us of this relation.

The clan was no artificial product. It was by no arbitrary legislative act that its elements were "incorporated:" it was merely the expanded form of the family itself, and its organization was on the same patriarchal model.[1] As in the case of the family, the double tie which held its members together was real or assumed blood relationship and a common worship. This is the most primitive bond of human society. Of the two elements entering into it, the worship of a common ancestor[2] was, perhaps, the more essential and it was regarded as the test of kinship.[3] But the various names of the institution disclose the bond of blood-relationship: the Latin *gens*, the Greek *genos*, the Gaelic *clan*, the Anglo-Saxon *cynn*, all are suggestive of common descent.[4] Each gens had an altar and a ritual exclusively its own which could not, without profanation, be

[1] Fustel de Coulanges, *Ancient City*, 141 ff. Compare on the gens Müller, *Doric Races*, II, 75–84; Schömann, *Antiquities*, 317, 364; Maine, *Ancient Law*, 256, 123–4; *Early Law and Custom*, Chap. VII; Morgan, *Ancient Society*, 214–34 (the Greek), 276–99 (the Roman), 357–79 (of other tribes):—Mr. Morgan, however, regards the family as derived from the gens, p. 227.

[2] Fustel de Coulanges, *Ancient City*, 9–52, has the best discussion of ancestor-worship; he is followed by Hearn, *Aryan Household*, 15 ff. Maine, *Early Law and Custom*, Chaps. III and IV has an admirable discussion. See also Taylor, *Primitive Culture*, Vol. II. (Animism). For India, J. D. Mayne, *Hindu Law and Usage*, 55, 438; on deification of men in India, Lyall, *Asiatic Studies*, Chap. II; on the Roman lares see Duruy, *Hist. of Rome*, I, 206.

[3] Fustel de Coulanges, 49–51; Hearn, 66.

[4] Skeat, *Etymological Dictionary;* Freeman, *Comp. Pol.*, 103, 394; Fustel de Coulanges, 140–41.

imparted to a stranger; and "stranger" meant anyone not a member of the clan. Race isolation and religious isolation were the almost insuperable obstacles to political development in early Aryan society. Even the gradual expansion of family into gens, of gens into curia, and of curia into tribe must have been slow and painful. As is well known, political isolation is the clue to the peculiar history of the Hellenic states: even Athens, save for a moment, never overcame the tendency of the Ionians to city autonomy and exclusiveness; while the later attempts to form federations came too late to stay the inevitable disruption.[1] On the other hand, the fact that Rome did finally surmount this barrier explains largely the wonderful career of the mistress of the world.[2] But in expansion of the primitive groups—the growth of the state—the fiction of adoption, by which relationship was artificially extended and strangers admitted to the *sacra*, was of immense service. Indeed, as Sir Henry Maine has said, it is difficult to see how early society could otherwise have escaped from its "swaddling clothes."[3]

Little can be said of the officers or organization of the clan. Each had its chief, *archos* or *princeps*, who acted as its "judge, priest, and military commander."[4] He was probably elected[5] by the clansmen—an important modification of the strictly patriarchal constitution of the family. There may have been also an executive council whose number seems to have been usually five.[6] Our knowledge of the primitive Aryan clan is

[1] See Freeman, *Hist. of Federal Government*, Vol. I; *Comparative Politics*, 90 f.; Cox, *Greeks* and *Persians*, 9 f.; *Athenian Empire*, 3 f., 39 f., 51 f., etc.

[2] Freeman, *Comp. Pol.*, 97; Fiske, *American Political Ideas*, 79.

[3] *Ancient Law*, 26, 125, 126. On the present use of adoption in India see J. D. Mayne, *Hindu Law and Usage*, 88 ff.

[4] Fustel de Coulanges, 137; *Dion. Halic.*, II, 7; Boeckh, *Corp. Inscrip.*, 397, 398.

[5] Marquardt, *Staatsverwaltung*, III, 133, says the Roman gens had an elected *flamen* to guard the *sacra*. Morgan, 225, 297.

[6] This is discussed by Hearn, 128 ff. See further on the Greek and Roman gens Pauly, *Real-Encyclopädie*, III, 700 ff.; Mommsen, *Staatsrecht*, III, 3–53; Müller, *Handbuch*, IV, 19 f., 491 f.; Muirhead, 6 ff.

vague and fragmentary; but much help may be obtained from India where an immense mass of indigenous custom has been preserved, and where the clans and other genealogical groups may be seen in actual process of growth and disintegration. Here the concentric circles of affinity are numerous and intricate and often artificially extended.[1]

In like manner the gentile organization among the Celts of the British islands survived far down into historic times; and here scholars have been able to study its essential principles in full operation.[2]

But for a clear realization of society under the clan organization it is only necessary to turn to living examples among other branches of mankind. Undoubtedly the nomadic Turanians of Asia, the Semites of the deserts,[3] and the savage races of Africa and Oceanica, when due allowance for ethnological characteristics is made, present true pictures of such society; and the researches of an American scholar have revealed the exact counterpart of gens, curia, and tribe among the Iroquois and other red Indians of this continent.[4] In the primitive ages, it is probable that our Aryan ancestors also led a pastoral life and had no conception of property in land. But the nomadic stage was superseded at an exceedingly early day by that of permanent settlements in village communities; for the latter wherever found, are but localized clans,[5] whose origin is coeval with the beginning of communistic occupation and cultivation of the soil. Among the Hellenic and Italic gentes, as elsewhere, a pastoral probably preceded a village life; but at the very dawn of history this second or township stage had already yielded to the city;[6] only in the wild regions of

[1] See the interesting discussion of Lyall, *Asiatic Studies*, Chap. VIII.

[2] Freeman, *Norman Conquest*, V, 310; *Comp. Pol.*, 102, 116, 394; Frederic Seebohm, *Eng. Vil. Com.*, 181–251; Maine, *Early Hist. Inst.*, Chaps. II–VII; *Ancient Law*, 260.

[3] Duruy, *Hist. of Rome*, I, 190–1.

[4] Lewis H. Morgan, *Ancient Society*, New York, 1878.

[5] Freeman, *Comp. Pol.*, 102, 117.

[6] Athens, Sparta, Mantineia, Rome and various other places seem certainly

western Greece did the "tribe and the village" survive in the classic age.[1]

At the period described in the Homeric poems, the Greeks had reached a form of the state still higher than the phulê: the polis or city, formed by the gathering of tribes or parts of tribes—for all the Ionic cities, including Athens were composed of the four phulai.[2] The polis was the highest conception of the state which the Greeks attained. Four stages of development—gens, phratry, tribe and city, the latter wonderful in what it compassed for civilization—were successively reached; but every attempt to pass beyond the latter to a fifth and grander phase—the nation—failed. That glory was reserved, not even for the Romans, but for the third of the great races which have in turn filled the page of history.[3] With the growth of the city the old bond of common blood and common religion had to yield to the needs of a more comprehensive state. The efforts of Solon and Kleisthenes to supersede the old religious bodies for political functions, by the creation of artificial classes and phulai with local subdivisions, are but marks of the change; just as the tradition of the formation of new gentes and tribes by the Tarquins is significant of a similar crisis at Rome. But to the end the clan, or its local substitute, remained the political unit. Such was the *demos* of the Kleisthenian constitution;[4] and, accord-

to have been formed by the coalescence of village communities. Maine, *Early Hist. Inst.*, 84; Freeman, *Comp. Pol.*, 88–9, 106, 380–3; Grote, II, 258–61. In historic times private property was the rule in both Rome and Greece: Fustel de Coulanges, 76 ff. But various things point to an earlier communistic stage.

[1] Freeman, *Comp. Pol.*, 88–9.

[2] In like manner in Sparta and in the Dorian cities, generally, there were three tribes: Hylleis, Dymanes (Dymanatae), and Pamphili: Müller, *Doric Races*, II, 76. Cf. Schömann, *Antiquities*, 211, 128 f., 38, 39; Müller, *Handbuch der klass. Alt.*, IV, 21.

[3] Freeman, *Comp. Pol.*, 120.

[4] Demes existed before Kleisthenes and were probably the townships settled by gentes; but now the tribes were regularly divided into districts,

ing to tradition, the Roman senate was originally composed of 300 members—one for each of the gentes of the three primitive tribes. But at a later time local tribes and their divisions, the pagi, were substituted as military, fiscal and legislative districts.[1]

II.—The Mark.

(*a*).—*The Primitive Community of Cæsar and Tacitus.*

The earliest traditions of Rome reveal to us society in an earlier stage than that of the Greeks in the age of Homer: for the process of incorporating the tribes in the city is clearly described, a fact without parallel in Hellenic legend. On the other hand the conception of the state to which our own ancestors had attained, when they first emerge to view, was still more primitive than that of the founders of the Eternal City. "Among the ancient Germans and Scandinavians," says Freeman, "and not least among the Teutonic settlers in our own island, we see many things face to face which in Greece and Italy we see but darkly; we see many things for certain which in Greece and Italy we can only guess at; we see many things still keeping their full life and meaning, of which in Greece and Italy we can at most spy out traces and survivals. It is among men of our own blood that we can best trace out how, as in Greece and Italy, the family grew into the clan—how as in Greece and Italy the clan grew into

though those of the same tribe were not adjacent. Wachsmuth, I, 398, 453 f.; Herodotus, I, 60, 62; Schömann, *Antiquities*, 366; *Athenian Const. Hist.*, 64–8.

[1] Smith, *Dict. Antq.*, 848 (Pagi), 1149 (Tribunus).

Mr. Freeman regards the original tribes as "essentially local" and holds that early localization was a distinguishing mark of the Italic communities; doubtless the genealogico-religious bodies often settled together: *Comp. Pol.*, 108–9. The Ionic genê also settled together, and some of the demes of Kleisthenes seem to have corresponded with, and borne the names of, genê. Grote, IV, 131 ff., III, 63 f.; Wachsmuth, I, 397 f.; Schömann, *Antiquities*, 366; *Athenian Const. Hist.*, 10, 11; Gilbert, *Handbuch*, II, 307.

the tribe—and how at that stage the development of the two kindred races parted company—how among the Teutons on either side of the sea, the tribe has grown, not into the city, but into the nation."[1]

At the dawn of history Teutonic society had already attained a complex development. The initial organism was the mark or markgenossenschaft, a group of clansmen. Several mark societies united to form the hundertschaft—the analogue of the curia or phratria. Finally an aggregation of hundertschaften constituted the völkerschaft or tribe. Each of these organizations, larger and smaller, seems to have been united by the tie of kindred, though fast yielding to the influence of localization; and each had a special part to perform in the social order.[2] The mark was the self-governing local com-

[1] *Comp. Pol.*, 111. Cf. Waitz, *Verfassungsgeschichte*, I, 19; and for an admirable account of the civilization attained by the primitive Germans, Ib., 29–48; Dahn, *Urgeschichte der Germanen*, etc., I, 31 ff.; Arnold, *Deutsche Urzeit*, 187 ff.

[2] The commonly accepted theory represents mark, hundertschaft, and völkerschaft as successive evolutions—as organisms formed on the same general model. An exception is made in the case of the mark whose assembly is denied true judicial functions; but the assemblies of both hundertschaft and völkerschaft are "essentially courts:" Waitz, *Verfassungsgeschichte*, I, 316; *Das alte Recht*, 143; Freeman, *Comparative Politics*, 118; Grimm, *Rechtsalterthümer*, 745; Schulte, *Reichs- und Rechtsgeschichte*, 25–6.

But Sohm combats this theory and insists that each member of the social body had a distinct character. He thus summarizes his argument: —

"Von den drei Gliederungen des nationalen Organismus hat jede ihre besondere Aufgabe zu erfüllen. Der Stammesverband bildet die Einheit für das allgemeine ethische, der Völkerschaftsverband die Einheit für das politische, der Hundertschaftsverband die Einheit für das gerichtliche Leben. In der Versammlung, der Gesandten aller Völkerschaften "desselben Bluts" tritt uns die Cultusgemeinde, in der Versammlung der Völkerschaft tritt uns die souveräne Gemeinde, in der Hundertschaftsversammlung tritt uns die Gerichtsgemeinde entgegen. Die Stammesverfassung ist Cultusverfassung, die Völkerschaftsverfassung ist Staatsverfassung, die Hundertschaftsverfassung ist Gerichtsverfassung. Der Stammesgenosse ist der Bluts- und Sinnesgenosse, der Völkerschaftsgenosse ist der Staatsgenosse, und der Hundertschaftsgenosse ist der Gerichtsgenosse:" *Reichs- und Gerichtsverfassung*, I, 7–8; 57–74. See also Stubbs, *Const. Hist.*, I, 28–9.

munity. The hundertschaft discharged the functions of a military and judicial unit. The völkerschaft was the bearer of political sovereignty. It was the civitas or state itself. Beyond this—the tribe, as the highest conception of government, of political union—the Teutonic mind had not passed. The city did not exist. The stamm or union of kindred völkerschaften, the analogue of the Doric or the Ionic race, had as yet no political significance. It was merely an ethnic and religious unit—a *Cultuseinheit.* Much less was there a conception of German nationality in the modern sense. There existed, at the utmost, but a dim consciousness of a unity of all the stämme of Teutonic blood. As yet the stamm was the *bearer*—to use an expression of Sohm—of the natural attributes of nationality.[1]

In the Commentaries of Caesar our Germanic ancestors are seen in a state of transition from the pastoral to the agricultural life.[2] There is as yet no permanent occupation of land; no villages with substantial dwellings. Lands for pasturage and cultivation are assigned to each larger and smaller group of kindred by the chiefs. There is no private ownership of land in definite quantity with fixed boundaries; it is held but a single year when the community is compelled to move elsewhere to take possession of new allotments. Little attention is given to agriculture; but war and the chase are the chief

[1] Aber nicht der gesammtnationale, nicht der Völkerschafts-, nicht der Hundertschaftsverband, der Stammesverband ist *der* Träger der natürlichen nationalen Einheit. Es hängt damit zusammen, dass die natürlichen nationalen Güter Stammesgüter sind. Aus *diesem* Grunde ist Sprache, Sitte, Recht und Religion (die heidnische Religion ist eine nationale) Stammessprache, Stammessitte, Stammesrecht und Stammesreligion. Der Stamm ist die Einheit für die natürliche nationale Entwickelung." Sohm, *Reichs- und Gerichtsverfassung*, I, 2.

[2] Caesar, *De Bel. Gal.*, VI, 22: Agriculturae non student . . . Neque quisquam agri modum certum aut fines habet proprios; sed magistratus ac principes in annos singulos gentibus cognationibusque hominum, qui una coierunt, quantum et quo loco visum est agri attribuunt, atque anno post alio transire cogunt. On the Suevi, *Ib.*, IV, 1.

occupations.[1] Clearly here we find society in a very rude condition; the nomadic life is scarcely yet ended, though allowance must be made for the fact that Caesar saw the German tribes in a state of unusual movement and disruption.[2]

In the Germania of Tacitus, one hundred and fifty years later, we find a decided advance upon the state of things described by the conqueror of Gaul. There are now permanent settlements, substantial villages, and an increased agriculture. But the arable lands are changed each year, or at least periodically,[3] there are both "shifting occupation" of the entire allotment of each group and "shifting cultivation" of the arable.[4]

But Tacitus, as usually interpreted, appears to describe two forms of settlement. On the one hand were isolated homesteads or simple family groups, planted wherever "fountain, field, or forest" invited; on the other hand, villages, each dwelling being surrounded by an open space; but cities were as yet unknown.[5] We are here particularly concerned with

[1] But see Meitzen, *Der Boden des Preuissischen Staates*, I, 344.

[2] On the Germans as described by Caesar, see Waitz, I, 92–102; Thudichum, *Der altdeutsche Staat*, 91 ff.; Stubbs, *Const. Hist.* I, 13–17. But particularly, the searching criticism of Hanssen, *Agrarhistorische Abhandlungen*, 77 ff.; G. L. v. Maurer, *Einleitung*, 3, 5.

[3] Tacitus, *Germania*, c. 26; Agri pro numero cultorum ab universis in vices occupantur, quos mox inter se secundum dignationem partiuntur; facilitatem partiundi camporum spatia praestant. Arva per annos mutant: et superest ager.

[4] Prof. W. F. Allen, *Primitive Democracy of the Germans*, p. 12. On the much discussed Chap. 26 of the Germania, and its relation to Caesar's account see Hanssen, *Agrarh. Abhl.*, 91 f. who thinks it probable that, in the time of Tacitus as well as that of Caesar, the entire *feldmark* of the settlements in some *gauen* may have been periodically changed; while in other *gauen*, only the fields—aecker—within the *feldmark* may have been shifted. See also Waitz, I, 103 ff.; Inama-Sternegg, *Deutsche Wirthschaftsgeschichte*, 7 ff.; Thudichum, *Der altd. Staat*, 96 f.; Baumstark, *Erläuterung*, 714 f, where various interpretations are collated and criticised.

[5] Tacitus, *Germania*, c. 16. "Nullas Germanorum populis urbis habitari, satis notum est: ne pati quidem inter se junctas sedes. Colunt discreti ac diversi, ut fons, ut campus, ut nemus placuit. Vicos locant, non in nostrum

the village settlement, not only because it was probably of far greater importance in the life of the primitive Germans—the separate farmsteads being usually found only under exceptional circumstances—but because it is identical with the mark-society or village community whose history from a very early time is full and distinct. Let us then examine its constitution and character as a member of the political organism.

(*b*).—*Growth of the Mark Constitution.*

The mark or markgenossenschaft was in its origin a localized clan, held together by the double tie of common religion and real or assumed blood-relationship.[1] But the relationship

morem, connexis et cohaerentibus aedificiis: suam quisque domum spatio circumdat," etc.

This passage has given rise to much discussion. G. L. v. Maurer holds that there were two modes of settlement, both prevailing among freemen—single *Höfe* or farmsteads and the *vici* or *Dorfschaften*. But the former were not, as Möser and Kindlinger imagine, mere *Einzelnhöfe*—holdings of independent proprietors; on the contrary several such family groups formed a union, called also *vicus*, having community of enjoyment in the waste, but not in the arable—no *Feldgemeinschaft: Einleitung*, 2, 5, 30–35. But the Dorfschaft had community in both arable and waste. The village system was of far greater importance than that of the single homesteads—the latter being found usually in mountain districts, as at present in the Odenwald, Tirol, Voralberg, etc., *Ib.* 6, 9, 10, 11, 12. Denman Ross contends that the *Einzelnhöfe* were the private estates of freemen, while the *vici* were villages of slaves and dependants who cultivated those estates: *Early History of Landholding among the Germans*, 1 ff. Frederic Seebohm agrees substantially with Mr. Ross: *Eng. Village Community*, 338 f. Prof. W. F. Allen of the University of Wisconsin has ingeniously suggested that those described by Tacitus as living *diversi ac discreti* were the chiefs or *principes* surrounded by their *comitatus;* while the mass of freemen lived in villages: *Prim. Democracy of the Germans*, 6–7. Cf. Dahn, *Urgeschichte*, I, 54–5.

[1] Cæsar, VI, 22, states that land was granted to *gentibus cognationibusque.* Tacitus, c. 7, says the army was organized according to *familiae et propinquitates.* Cf. Schmid, *Glossar*, 626; Waitz, I, 76 ff. notes; Maurer, *Einleitung*, 3, 4, 13; Thudichum, *Der altd. Staat*, 35; Laveleye, *Primitive Property*, 106 (religious ceremonies of the mark); Hanssen, *Abhand.*, 87; Dahn, *Urgeschichte*, 103–4; Kemble, *Saxons*, I, 56 f.; Inama-Sternegg, *Deutsche Wirthschaftsgeschichte*, 73 ff.

was more frequently artificial and the religious tie was much weaker than in the clan. Nevertheless for a considerable time after settled life began the principles of the family union—of which the clan here as elsewhere was but the expanded form—were determinative, not only for the relations of the mark-men among themselves, but also for the relation of the mark-society to the *hundertschaft* and state.[1] But gradually an entirely new principle, that of local contiguity, became more and more prominent as a condition of social and political privilege. The derivation of the word *mark* is significant of this new principle: it means primarily any token or sign, hence a border, a boundary; and probably it was originally applied to the fringe of forest which surrounded the occupied territory of the community.[2] But in practice the term is also used not only for the entire landed possession, whether arable or waste, but for the society itself. Above the mark in ascending series were the hundertschaft or gau—the *pagus* of the Germania;[3] and the völkerschaft or *civitas*—the state itself. In these we recognize at once the curia and tribe in their territorial aspect. And, as in the case of the clan, the mark is the political unit.[4] But it is something more. The mark-moot is the centre of an active

[1] The great importance of the family constitution in the genesis of the Markgenossenschaft is ably set forth by Inama-Sternegg, *Die Ausbildung der grossen Grundherrschaften in Deutschland*, 6–24. He thus concludes his argument: So ist es denn wohl gestattet, den Gedanken auszusprechen, dass die Familie, wie sie die Wurzel des markgenossenschaftlichen Verbandes war, so auch noch lange zeit massgebend für die Ausgestaltung der markgenossenschaftlichen Verhältnisse blieb. In dem Familienverbande, der das Geschlecht zusammenhielt, liegt die Erklärung für die persönliche Einheit der Genossenschaft, wie für ihren Gesammtbesitz; sie war eine rechtliche wie ökonomische, eine sociale und religiöse Einheit, wie das immer von der markgenossenschaft späterer Zeit ausgesagt wird. *Ib.*, p. 11.

[2] Kemble, *Saxons*, I, 42 f.; Grimm, *Rechtsalterthümer*, 496–8; Maurer, *Einleitung*, 40–45; Laveleye, *Prim. Prop.*, 105.

[3] On the significance of *gau* and *pagus* see below, Chapter V, II, (*a*), note.

[4] Sohm, however, denies that the mark has any political significance: *Reichs- und Gerichtsverf.*, I, 7, 231. Cf. Allen, *Town, Township and Tithing*, 142 ff.

civil self-government of ever increasing importance. Under the presidency of an elected or hereditary chief,[1] in the open air, the assembly of mark-men constitutes at once a judicial and a legislative body. Here petty differences are determined,[2] strangers are admitted to the Genossenschaft, the beginning of seed-time and harvest is agreed upon, and measures for securing the peace of the community and touching all that concerns the common economic life are devised. Such is the typical "village council" which Sir Henry Maine declares to be the embryo from which "have sprung all the famous legislatures of the world."[3]

(*c*).—*Economy of the Mark.*

The question of land-holding and agriculture among the early Germans has recently received from writers on institutions more attention, perhaps, than any other topic. The question is of course important from a social as well as an economic point of view. But for our purpose a bare statement of the present results of investigation will, perhaps, suffice. According to the theory which has thus far prevailed the mark is represented as a village community holding and cultivating the land in common. Private property in land—*sondereigen*—is at first unknown. The tenure is

[1] Maurer, *Einleitung*, 241. For various names of chief, see *Ib.*, 138–41. The chief is elected in the Russian *Mir* and the Swiss *Almend*: Laveleye, 9, 95; in South Slavonic house communities the eldest brother of the last chief is usually chosen; but eminent fitness alone sometimes determines the choice even of a woman: Maine, *Early Law and Custom*, 247–8.

[2] But Tacitus ascribes the functions of judge in the court of the *vicus* to the *principes*: *Germ.*, c. 12. The same seems to be affirmed by Cæsar: *De Bel. Gal.*, VI, 23. But Sohm, *Reichs- und Gerichtsverf.*, p. 6, note 17, maintains that the *per vicos* of Tacitus is but a repetition of *per pagos*: there was no public court—*öffentliches Gericht*—in the mark. But, whether it had proper judicial authority or not, the mark-moot certainly arbitrated local disputes.

[3] *Early Hist. Inst.*, 388. On the mark constitution see Maurer, *Einleitung*, 140–72; *Markenverfassung*, 71–450; Kemble, I, 53 f.; Laveleye, *Prim. Prop.*, Chap. II (Russian *Mir*), Chaps. V, VI (Swiss *Almend*).

merely *gewere*[1] or possession. Private ownership, according to this theory, is the comparatively late result of the "disentanglement of individual from collective rights."[2] Of late, however, a series of able writers have attacked this view and substituted a theory precisely the reverse. According to these writers private property in land existed first among the Germans, and collective ownership was the late result of the "entanglement of individual rights, and the gradual annihilation of them."[3] But whatever view may eventually prevail as to the origin of private property, common cultivation seems everywhere to have been a characteristic of the mark from very early times. The entire territory of the community was divided into three portions: the village mark, the arable mark, and the waste or undivided mark. The village was surrounded by a wall or hedge, and within it each family had its dwelling with a *hof* or plat of ground, likewise enclosed. Each cultivator was entitled to a fixed share of the arable and to a certain enjoyment of the waste.

An intricate system of agriculture was gradually developed. The arable land was usually divided into three fields or *zelgen:* one for summer grain, one for winter grain, and one to lie fallow in rotation. Sometimes the zelgen were further divided into acre strips and then distributed by lot among the mark-

[1] On *gewere* see Maurer, *Einleitung*, 97–105; for the derivation, Ross, 22, 167–8; Grimm, *Rechtsalt.*, 555–6.

[2] This theory finds its chief exponent in G. L. v. Maurer, who has written a series of works on the history of the Mark, Dorf, Hof and Stadt constitutions, embodying the results of immense research. His view is adopted by the great majority of the very numerous writers on the village community and land-holding.

[3] One of the first to raise serious doubt as to the truth of the popular theory was Inama-Sternegg, *Deutsche Wirthschaftsgeschichte*, first three *Abschnitte*. This was followed by the *Early History of Land-holding among the Germans* by Denman Ross of Cambridge, Mass., and Frederic Seebohm's *English Village Community*, both of which show much originality and research. Recently Fustel de Coulanges, *Recherches sur quelques Problémes d'Histoire*, 189–315, has taken substantially the same position as Mr. Ross.

men. Such are the broad outlines of the so-called "three field system"—*Dreifeldwirthschaft*, which seems to have been the more common method. But in the days of Tacitus, and for sometime thereafter, it is probable that a much ruder system prevailed—the so-called *Feldgraswirthschaft* of the German writers.[1] This consisted simply in cultivating a portion of land until it became exhausted; then allowing it to lie fallow while another tract was cultivated in its stead.

III.—The Tunscipe.

(*a*).—*Relation to the Mark.*

In the early records of English history the *tunscipe* or township appears as the lowest form of self-government and the primary division of the state.[2] The name itself shows its continuity with the mark: under whatever form—the old German *zún*, the modern German *zaun*, the Anglo-Saxon *tun*, the English *town*—it means hedge or fence, just as mark means boundary.[3] The historic identity of clan, mark, and tunscipe is further disclosed by the fact that the names of individual townships are often patronymics. "It is probable," says Stubbs, "that all the primitive villages in whose name the patronymic syllable *ing* occurs were originally colonized by communities united either really by blood or by a belief in a common descent."[4] Kemble has given a long list of names

[1] Hanssen, *Agrarhist. Abhandl.*, 125 ff.; Inama-Sternegg, *Deutsche Wirthschaftsgeschichte*, 400 ff. For other systems of cultivation see Hanssen, 171 ff.; Seebohm, *Eng. Vil. Com.*, 368 ff.

[2] *Tun* in Hloth. and Ead. 5, Schmid, 16, seems plainly to mean township (7th century). *Tunscipe* for the inhabitants or community of a *tun* occurs in Eadgar IV, 8: Schmid, 196. *Tunesmen* appears in *Ib.*, IV, 8, 13: Schmid 196, 199. Aelfred's Baeda, III, 17, V, 10, renders vicus and viculus by *tun* and *tunscipe:* Stubbs, I, 82, note 6. But *tun* in the early laws often means merely the fortified house of a king or lord. Schmid, *Glossar*, 663.

[3] Schmid, *Gloss.*, 663; Skeat, "Town;" Allen, *Town, Township, and Tithing*, 145.

[4] *Const. Hist.* I, 81.

of places which he regards as being originally names of groups of kindred settled in mark-societies.[1] But it is a matter of dispute whether the mark system of free *genossen* or associates ever existed in England. Mr. Kemble[2] maintained that it was transplanted in its purity to the soil of Britain; and Professor Freeman has given this theory his powerful support.[3] But for a hundred and fifty years after the first English settlement there is a complete blank in historic records. Bishop Stubbs, ever cautious as to his inferences touching this early period, says of the township that "in its earlier form it may have been the community of free and kindred cultivators, or what is called the *Mark*. It cannot be safely affirmed that the German settlers in Britain brought with them the entire mark organization, or that that system was ever in Anglo-Saxon times the basis of local organization. . . . But of such an institution there are distinct traces."[4] The recent investigations of Frederic Seebohm have, however, established a strong probability that from the earliest Teutonic settlements in Britain society was developing itself on manorial lines, lands being cultivated in common, chiefly by serfs, according to the "open field system."[5] But whatever the original state

[1] *Saxons*, I, 58 ff., 449–86. See however Waitz, I, 79, who thinks that the endings, *ing*, *ingen*, *ungen* may denote connection in general—*eine Zugehörigkeit:* eben so gut geographische als persönliche Beziehungen liegen dabei zu Grunde. Konrad Maurer, *Krit. Ueb.*, I, 70, follows Kemble, but urges caution in inferences from names.

[2] *Saxons*, I, 35–71.

[3] *Comparative Politics*, 123, 395, 409 f; *Norman Conquest*, I, 57; *Growth of the English Const.*, Chap. I. This view is also held by Green, *Hist. Eng. People*, I, 10 ff.; *Making of England*, Chap. IV; *Short Hist.*, 41. K. Maurer, *Krit. Ueb.*, I, 63 ff. agrees mainly with Kemble, comparing the views of other writers.

[4] *Const. Hist.* I, 83. Gneist, *Selfgovernment* (1871), p. 2, says: Die gemeinsamen Marken der Hundertschaften und Dorfschaften haben hier von Anfang an keine für die Verfassung entscheidende Bedeutung.

[5] *The English Village Community*, particularly p. 179. Mr. Seebohm's theory has been attacked by Prof. Allen, for the ante-Norman period in *The Village Community and Serfdom in England*, and by Mr. Paul Vinogradoff

of English society may have been, the labors of the last named scholar and various preceding writers have proved conclusively that common fields still exist and have existed for ages in England and that common cultivation lasted until very recent times.[1]

(*b*).—*Old English Town Organization.*

Let us now pass to the question which more nearly concerns our present purpose—the character of the township organization. As we have already seen it bore traces of the essential elements of the primitive clan. There was originally community of blood and even of worship: and when the ancient gods were dethroned, the pagan fane was superseded as a common sanctuary by the parish church.[2] But the principles of blood and religion were shadowy and no longer constituted the real bond of society. The township appears in a strictly political aspect as the unit of the "constitutional machinery." Distinction is made between "free" and "dependent" townships: the former "may represent the original allotment of the smallest subdivision of the free community, or the settlement of the kindred colonizing on their own account;" the latter is "the estate of the great proprietor who has a tribe of

in his *Inquiries into the Social History of Mediæval England*, which treats of the 11th, 12th and more particularly of the 13th centuries. This work though untranslated from the Russian has been ably reviewed and a clear outline of its purpose given by Prof. Kovalevsky in the *Law Quarterly Review* for July, 1888.

[1] Mr. Seebohm has traced the system and illustrated it with charts, in his own township of Hitchin, which is also a royal manor. See Nasse, *On the Land Communities* etc. *in England;* Maine, *Village Communities*, Chap. III; William Maurer, *Anglo-Saxon Mark Courts;* Gomme, *Traces of Primitive Village Communities in Eng. Munc. Inst., Archaeologia*, Vol. 46, 1880–81. On rights of Common and the Enclosures, Williams, *Rights of Common;* Elton *The Law of Common and Waste Lands;* and *Observations on the Bill for the Regulation and Improvement of Commons.* Laveleye, *Prim. Prop.*, Chap. XVIII. See also Gomme, *Primitive Folk-Moots*, 9, 10, 116–118; Pollock, *Land Laws*, 19–50; Taylor, *Domesday Survivals, Cont. Rev.*, Dec., 1886.

[2] Kemble, *Saxons*, I, 73; II, 424.

dependents."[1] At least from the beginning of the tenth century, it is likely that the majority of communities had become economically dependent; and before the Norman Conquest the infeudation of the land was nearly if not quite complete, while jurisdiction had also in most cases been gained by the thegns or territorial lords.[2] But whether free or dependent the constitution of the township was practically the same. In the tungemot or town-meeting was transacted all the important business of the community. Here by-laws[3] were enacted by the assembled freemen or tenants, the less important contentions between man and man adjusted, and petty offenders tried and punished. But the hundred moot was the regular tribunal for the more important judicial business. The tungemot was a "meeting" rather than a court.[4] The officers of the township were the *gerefa*[5] or head-man, the bydel or messenger,[6] and the tithingman. In the free township these were probably elected by the people, but in the dependent the reeve and bydel were appointed by the lord;[7] while the tithingman was probably always an

[1] Stubbs, I, 82.

[2] This is the view of Stubbs, *Const. Hist.*, Chap. VII; but if Seebohm is correct manorial townships prevailed from the beginning. For views of older writers see Ellis, *Int. to Domesday*, I, 224–5; Spelmann, *Origin*, etc., of *Feuds and Tenures*, in *English Works*, 1–46.

[3] That is, "town-laws:" from the Danish *by:* Skeat; Stubbs, I, 90; Palgrave, *Commonwealth*, I, 80.

[4] Stubbs, I, 90.

[5] The derivation of *gerefa* is obscure. Skeat, "Reeve," derives it from A. S. *rôf*, active, or excellent; Kemble, *Saxons*, II, 154, gives the same derivation. Skeat denies its connection with German *Graf*. Spelmann, *Glossary* (1626), pp. 319–20, derives it from A. S. *reâfan*, to plunder; therefore *exactor*. See Kemble, II, 151–4, and Stubbs, I, 82, note 7, for a discussion of views.

[6] Canute, I, 26; Eadgar, IV, 1, § 2; Schmid, 268, 194. In Schmid, *Anhang*, IV, 19, p. 387, the bishop is called the "bydel of God's law."

[7] Stubbs, I, 82, who quotes Aethelstan, III, 7, § 1: Si tunc sit aliquis, qui tot homines habeat, quod non sufficiat omnes custodire, praeponat sibi singulis villis praepositum unum. Schmid, 149; Palgrave, I, 82.

elective officer.[1] In the town-meeting were also executed the decrees of the higher courts relating to taxation, pursuit of criminals, and the search for stolen goods; but in the dependent townships some of these duties devolved upon the lord's steward or gerefa.[2]

(*c*).—*The Germ of Representative Government.*

Besides its powers as a self-governing body and as agent of the higher administration, the township possessed one privilege of surpassing interest: the right of representation through the "reeve and four best men" in the assemblies of the hundred and the shire. In this we see the germ of that representative system which characterizes English civil and ecclesiastical government. From this humble beginning it has gradually expanded until it now embraces the united church in convocation and the united kingdom in the House of Commons; while in America it has proved its capacity to bind together in a strong federal union a still broader empire.[3] Simple as is the expedient of popular representation, it is none the less true that it never once occurred to the Hellenic or Roman world save perhaps vaguely in the decline of the Grecian States.

The concentric circles of Aryan social and political organism each finds its analogue in our own institutions; but each has become a strictly local group, a mere neighborly association. The once sacred and imperative conditions of social or political privilege, community of blood and religion, have long since ceased to be more than a recollection. Township expanded into hundred, and hundred into shire; but the shire

[1] Stubbs, I, 90, note 3.

[2] Stubbs, I, 90, where the laws are cited. On the primitive "open air" meetings and their functions much interesting information is given by Gomme, *Primitive Folk-moots*, London, 1880.

[3] See on the township and representation, John Fiske, *American Political Ideas.*

became a part of the kingdom, not the territorial appendage of a city. In England the city has always constituted an integral and dependent part of the shire, at most having an independence in local affairs based strictly on the concessions of its charter.

IV.—Affiliated and Differentiated Forms of the Township: The Tithing and the Manor.

The history of the various offshoots of the township furnishes one of the most interesting examples of institutional evolution. In the adaptation of its organism to the discharge of new groups of functions, required by a more developed and complex social life, a process takes place strictly analogous to the differentiation of variety or species in animal or vegetable forms. The township is historically identical with no less than four bodies, none of which are popularly associated with it. These are the tithing, the manor, the parish, and the borough. The development of the latter from the *burh* or more strictly organized township of the old English period, constituting a most interesting example of institutional evolution, cannot here be traced: the others will be noticed in the order named.[1]

(*a*).—*The Tithing.*

The origin of the *teothung* or tithing is very obscure. The name itself seems to imply either a tenth of some larger whole, as the hundred, or a union of ten men or families. On the Continent traces of such an institution as a mere numerical division of the host have been discovered in the laws of the Franks, Bavarians and Burgundians.[2] Simply as a personal body it may, perhaps, be regarded as a common Germanic

[1] On the evolution of the Borough, see Vol. II.

[2] K. Maurer, *Krit. Ueb.*, I, 76.

institution;[1] but on the Continent it does not appear anywhere to have reached the stage of localization. Whatever may have been its original character, the tithing first comes to view in England in the laws of Eadgar,[2] seemingly as both a personal and territorial division of the hundred.[3] In some instances, therefore, it would probably already correspond to the township: for the name had lost the exact numerical significance which it may once have possessed.[4] At any rate the result was in many cases, that sooner or later both the name and the functions were sunk in the township. On the other hand it is remarkable that in some shires an opposite process has taken place. According to Pearson "all the counties south of the Thames, except Kent and Cornwall, and the two counties of Gloucestershire and Worcestershire, contain one or more tithings, which still have distinct limits. In some cases two or more tithings make up a parish; in others the tithing is added on. Elsewhere sub-divisions of this sort are known as townships or hamlets. The former is the usual term in the west and north: the latter in the east."[5]

[1] Waitz, I, 167, denies that the tithing was an original Teutonic institution. Gneist, *Hist. Eng. Const.*, I, 51, 458 f., declares that the *decania* or *decuria* of the Franks and other continental Germans was a mere division of the host without constitutional significance. See his *Selfgovernment* (1871); cf. Creasy, *Hist. of England*, I, 169.

[2] Eadgar, I, 2: in case of stolen cattle "let it be made known to the hundredman, and let him (make it known) to the tithingmen; and let all go forth to where God may direct them to go: let them do justice on the thief," etc.: Thorpe, I, 259. Cf. Eadgar, I, 4. Canute, *Secular Laws*, 20: Thorpe, I, 387, orders every free man to be brought into a hundred and a tithing.

[3] Gneist, *Hist. Eng. Const.*, I, 51–2, denies that the old English tithing had any local significance, local tithings appearing first in the 14th century. But see Pearson, *Mid. Ages*, I, 250–1; Palgrave, *Commonwealth*, II, CXXI; Phillips, *Angelsächs. Rechts.*, 82; Stubbs, I, 86.

[4] Palgrave, *Commonwealth*, I, 192; II, CXXI; Waitz, *Verfassungsgeschichte*, I, 448. Cf. Spencer, *Principles of Sociology*, II, 462 ff.; Dr. H. B. Adams, *Saxon Tithingmen*, 16 ff.

[5] Pearson, *Historical Maps*, 57. Cf. *Ib.*, p. 29; Stubbs, *Const. Hist.*, I, 86, note 2.

In the tenth century, however, the tithing was employed mainly as a police organization. The only officer was the tithingman—the prototype of the petty constable. His duties, like those of the hundredman above him, were largely concerned with the pursuit of thieves and other malefactors and the search for stolen goods.[1]

(*b*).—*The Manor.*[2]

It was by an interesting but entirely natural process that the tunscipe became transformed into the manor. The name[3]

[1] See further, Kemble, *Saxons*, I, Chap. IX, who, however, confuses the tithing with the *gegyldan* and the frankpledge. The whole subject is reviewed by Waitz, *Verfassungsgeschichte*, I, Beilage I, 424 ff.; K. Maurer, *Krit. Ueb.*, I, 87–96; Toulmin Smith, *The Parish*, 15–16; Hallam, *Mid. Ages*, II, 265, 273 ff.; Taswell-Langmead, *Const. Hist.*, 35–6; Barnes, *Origin of the Hundred and Tithing*, in *Journal of Brit. Archæological Association*, 1872, pp. 21 ff.; Allen, *Town, Township and Tithing*, 152 ff.

[2] One of the earliest treatises on manorial law is *Le Court Leete et Court Baron* of John Kitchin, 1598. It is written in French and was designed as a practical manual for guidance of the courts. I have used a copy from the edition of 1623, kindly loaned me by Dr. H. B. Adams, of Baltimore. A later and more convenient work is the *Practice of Courts-Leet and Courts-Baron*, by Chief-Justice Scroggs, London, 1728. On the history of the manor some valuable notices may be found in Ellis' *Introduction to Domesday Book*; and Pearson's *Historical Maps of England* contains very interesting matter, especially the discussion of the relations of the manor to the township, parish, tithing, and hundred: see pp. 29 ff., 56 ff. The functions of the manorial courts are illustrated in Edward Peacock's *Notes from the Court Rolls of the Manor of Scotter*, where curious extracts from the original records are given. Glanville has one or two important passages; and manorial tenures are treated in Elton's *Tenures of Kent* and Somner's *Of Gavelkind*.

Among modern accounts I have found that of Gneist in his *Selfgovernment* and the *Const. Hist.* most satisfactory. For the early period Stubbs' *Constitutional History* is indispensable. Biener's *Geswornengericht*, Vol. I, Seebohm's

[3] Skeat: properly "a place to dwell in;" from old French *manoir, maneir*, to dwell: from Latin *manere*. Cf. Littre, *manoir*. *Mansus* is the corresponding Latin word in the documents of the Saxon period. Gneist, *Hist. Eng. Const.*, I, 148.

and the full development of the usages and organism of the latter belong, of course, to the Norman era. But territorially it originated, if not already in the age of Tacitus,[1] at least early in the old English period, being identical with the dependent township, already mentioned. In the later Saxon reigns great numbers of such large estates must have been created by grants of folc-land, and the grants usually included the profits of jurisdiction, if not the jurisdiction itself. And in those instances where full jurisdiction, civil and criminal, equivalent to that of the hundred court, was gained by lords with grants of sac and soc, the development of the manor was essentially complete.[2]

Village Community, Blackstone's *Commentaries*, Toulmin Smith's *Parish*, Stephen's *History of Criminal Law*, Spelmann's *Glossary*, and various other authorities have been of service. The difficulties of the question as to the origin of manors and of the original status of the bulk of the population whether free or servile, are clearly explained in Mr. W. J. Ashley's *Introduction to English Economic History and Theory*.

Leading special works on the law and procedure of the manorial courts are Scriven, *Treatise on Copyhold;* Ritson, *Jurisdiction of the Court Leet;* Jacob, *Complete Court Keeper or Lord Steward's Assistant;* Watkins, *On Copyholds;* Elton, *Custom and Tenant Right;* Hazlitt, *Tenures of Land and Customs of Manors*. For a bibliography of the subject see Gomme, *Literature of Local Institutions*, 168 ff., where may also be found a good historical sketch.

Lawrence's *Extracts from the Court Rolls of the Manor of Wimbledon* is a mine of information with respect to local customs and the business of the courts leet and baron. The as yet unpublished manuscript of Mr. Chas. M. Andrews, Fellow in History at the Johns Hopkins University, on the *Anglo-Saxon Manorial Life*, contains the best treatment which I have seen of that phase of the subject. Mr. Andrews' work will be published in the *University Studies*.

[1] As held by Ross and Seebohm. Stubbs, I, 33, thinks the "lordship—that quasi-manorial system—is only in very few particulars reconcilable with the sketch of Tacitus."

[2] Whether grants of anything more than the profits of jurisdiction existed until the very eve of the Norman Conquest is a matter of dispute. Stubbs, I, 184–6, believes private jurisdiction may have existed very early, and become general in the reign of Canute; but see on the whole question the *Anglo-Saxon Courts of Law*, by Prof. Henry Adams, *Essays*, pp. 27–54, who

The single manor was merely the township, territorially and personally, under new judicial and economical conditions. The great honor or liberty, it is true, often comprised an entire hundred, or even a county or parts of several counties; but these were composed of single manors whose organization was not destroyed by their incorporation in the larger body.[1] The transformation of the township into a manor did not necessarily imply a loss of liberty, of the right of self-government. The feudal lord might by usurpation become a grievous oppressor, but organically the old privileges were maintained: "the existence of the relations of homage made no difference in the fact of Local Self-Government—only in the particular form under which it should be exercised."[2] The essence of the change lay in the fact that a public jurisdiction was lodged in private hands.[3] In the Norman manor the old township gerefa is represented by the lord's steward; and the Saxon bydel appears as the bailiff; but it is interesting to note, as an instance of the differentiation of functions, that the old reeve and bydel still exist side by side with the new functionaries, but in a subordinate capacity under the name of grave and bedell; while for purposes of representation the "reeve and four" still appear in the hundred and shire moots.[4]

The local affairs of each manor were transacted in several different courts or assemblies. In the "court customary" held before the steward the business of the domestics and tenants of the domain lands—the villani, later copy-holders—

maintains that no such jurisdiction existed before Edward the Confessor. Contrary to the usual view, he holds that *socn* means a grant of the profits of jurisdiction, and that *sacu*, German *sache*, means jurisdiction. *Ib.*, p. 40 ff. Cf. K. Maurer, *Krit. Ueb.*, II, 57 f.; Schmid, *Glossar*, pp. 653, and Gneist, *Hist. Eng. Const.*, I, 52, 147 f., 170, who favor the earlier origin. See, also, Ellis, *Int. to Domesday Book*, I, 224 ff.; Pearson, *Historical Maps*, 29; Elton, *Tenures of Kent*, 9, 121; Gomme, *Literature of Local Inst.*, 171 ff.

[1] Stubbs, I, 399–402; Gneist, *Hist. Eng. Const.*, I, 148–9, 173 note.

[2] Toulmin Smith, *Self-Government*, 223–4.

[3] Stubbs, *Const. Hist.*, I, 401.

[4] Stubbs, *Const. Hist.*, I, 274.

was dispatched. This consisted of all civil actions concerning their services or holdings, or disputes among themselves.[1] The court baron[2]—the freeholder's court—was simply the old tungemot with a new name. This court exercised jurisdiction in all civil actions and in cases of theft and other minor criminal offences. The suitors were the freeholders of the "tenemental" lands, including all undervassals or "grantees" of the lord of the manor. As in the old tungemot they made their own by-laws and were the sole judges, deciding all questions according to the custom of the particular neighborhood.[3]

But by far the most interesting thing connected with the manor is the court leet, literally the folkmoot.[4] The term is generic: courts leet were not only granted to lords of manors, but to monasteries, boroughs, and even villages; or, on alienation of the landed estates, the leet jurisdiction might be reserved and thus become exercised over a district with which the possessor of the leet had no other connection.[5] But wherever found, according to the later theory of the lawyers, the leet must be regarded as an offshoot or branch of the sheriff's tourn[6]—that is, of the shire court sitting twice a year in each hundred of the county; and as such it is held to be always the

[1] On court customary see Wood, *Institute*, 511–16; Gneist, *Hist. Eng. Const.* I, 169; Scroggs, *Courts-Leet and Courts-Baron*, 80; Maine, *Village Communities*, 134; Stubbs, I, 399.

[2] Baron from O. H. G. *bar*, a man, Skeat. On the various uses of the word see Spelmann, *Glossary* (1626) p. 76 ff. The legal maxim is: man̄ ne posit est sans court barō: Kitchin, *Court Leete et Court Baron*, 4.

[3] On the court baron see Biener, *Das Eng. Geschwornengericht*, I, 50, 52; Blackstone, III, 33–4; Gneist, *Hist. Eng. Const.*, I, 170 f., 190; Stubbs, I, 184–6, 399; Glanville XII, 6, Phillips, *Eng. Reichs u. Rechtsgeschichte*, II, 443: Placita cujusque curiae secundem consuetudines suas agitantur, etc. Cf. text of Phillips, II, 86 f.

[4] Leet, cognate with German *Leute*. Gneist, II, 166; Adams, *Norman Constables*, 13.

[5] Gneist, II, 167.

[6] The tourn was therefore the "great court leet," as the old hundred court was the court baron of the hundred and the county court that of the shire. Stubbs, I, 104; Scroggs, *Courts-Leet and Courts-Baron*, 1 ff.

creation of royal prerogative. Accordingly in case of extinction by forfeiture or otherwise the leet jurisdiction merges in the tourn. It is a manorial court; but suitors are obliged to attend not as tenants of the franchise but as subjects of the crown—suit real.[1]

The jurisdiction of the manorial court leet was coördinate with that of the sheriff's tourn, extending to all crimes and offences punishable by common law, except pleas of the crown, being chiefly such as by the old system could be settled by money composition; and it is curious to observe that after magna charta had declared that *liberi homines* should not be amerced save by the judgment of their peers, it became customary to choose two suitors as "affeerers" to assess the penalties.[2] Grants of the right to have a court leet were eagerly sought in the Norman period, and paid for by heavy subsidies or fines. Three powerful motives for securing such grants existed: escape from the jurisdiction of the sheriff or his bailiff, who was arbitrary and negligent in the performance of his duties; the desire of the local communities to have restored the right of controlling their own affairs; and the wish of both lord and people to gain a criminal jurisdiction more extended than that of the court baron. And in this last right we have a signal proof that the functions of the town-

[1] Gneist, II, 166 f., *Hist. Eng. Const.*, 191–2.

There is considerable variation in the application of the nomenclature: "court of the manor" is used to comprehend the three courts as later distinguished; the *curia baronum* is also sometimes used to comprehend the "customary court." In a certain sense, the court leet is but an emanation of the court baron, through the tendency of legal science to differentiate and sharply define. It may therefore be regarded as originating in the ancient town and hundred moots. The theory that the leet is essentially a branch of the royal jurisdiction is a part of the tendency to make the king the source of justice. See Maine, *Village Communities*, 139–40. The jurisdiction of the *curia baronum* was also converted into a personal grant which could be refused. Gneist, *Hist. Eng. Const.*, I, 172; *Leges Hen.* I, 19: Schmid, p. 446.

[2] Gneist, II, 168; Scroggs, *Courts-Leet and Courts-Baron*, 6, 29.

ship were not curtailed by its conversion into a manor. There is in this instance an actual gain: while retaining its powers as a moot, the township has added the judicial powers of the hundred court—even those of the old county court as exercised by the sheriff in his tourn.

In the leet the steward was judge; but the verdict was rendered by a jury or rather committee of the suitors, the latter consisting of all persons between the ages of 12 and 60, residing within the precincts of the manor, except peers and clergymen. The leet jury is thus the representative of the ancient participation of the whole community in the local courts, reminding us of the twelve seignior thegns of the hundred and the shire moots.[1] In this court the suitors chose constables, enacted by-laws, kept the roll of their own membership perfect;[2] and the judicial procedure was identical with that of the ancient popular courts.[3] Leets were held regularly but twice a year;[4] and were therefore totally inadequate to discharge properly the functions of police or peace tribunals. Hence with the rise of justices of the peace, and the coöperation of other causes,[5] they gradually fell into decay. But the entire manorial machinery has survived to our own times, though shorn of much of its importance,[6] and the various courts have continued to discharge functions which demonstrate the identity of the manor with the most ancient form of local gov-

[1] Gneist, II, 167. For illustrations of the composition and procedure of the leet juries, see Lawrence, *Extracts from the Court Rolls of Wimbledon.*

[2] Toulmin Smith, *The Parish*, 47–8, note. See interesting examples of by-laws and orders in Peacock, *Notes from the Court Rolls of the Manor of Scotter*, 377–9, 383 ff. Cf. Kitchin, *Court Leete et Court Baron*, 45.

[3] Gneist, II, 168–9, describes the procedure. Cf. Toulmin Smith, *Self-Government*, 225; Stubbs, I, 401.

[4] But according to 18 Henry III, 1234, they were to be held once in three weeks; and they had been held under Henry II twice a month. Toulmin Smith, *Self-Government*, 220–21.

[5] Summarized by Gneist, *Hist. Eng. Const.*, I, 173–5; cf. *Ib.*, 190 f.

[6] This is the regret of Toulmin Smith who pleads for a revival of the courts: *Self-Government*, 273 f.; *The Parish*, 23, 216, 369, etc.

ernment. "The right of the markmen to determine whether a new settler should be admitted to the township exists in the form of admitting a tenant at the court baron and customary court of every manor; the right of the markmen to determine the by-laws, the local arrangement for the common husbandry, or the fencing of the hay-fields, or the proportion of cattle to be turned into the common pasture, exists still in the manorial courts and in the meetings of the townships: the very customs of relief and surrender which are often regarded as distinctly feudal, are remnants of the polity of the time when every transfer of property required the witness of the community, to whose membership the new tenant was thereby admitted."[1]

V.—The Parish.

(*a*).—*The Ancient Parish.*

In several respects the parish is the most interesting of local institutions. Every phase of its development—the growth of its territorial area; the way in which its name and organization became identical with those of the township, while it discharged at the same time separate ecclesiastical functions; its connection with the manor; the differentiated forms and the complex relations which it has developed in recent times—all this illustrates in a wonderful manner the vitality of social organisms: the persistence of the essential type in the midst of superficial change.

[1] Stubbs, I, 84–5.

On the court leet see also Burn, *Justice* (1756), 455–7; Wood, *Institute* (1754), 509–11; Bohn, *Pol. Cyc.*, III, 238–45; Blackstone, IV, 273–4; Stephen, *Hist. of Crim. Law*, 1, 82, 126 f.; Toulmin Smith, *The Parish*, index; Merewether and Stephens, *Hist. of Boroughs*, who insist on their continuity with the Saxon folkmoots: see index; Kitchin, *Court Leete et Court Baron*, 47–53. Gomme, *Primitive Folk-Moots*, 113–135, has an excellent account of the "open-air courts" of the manor.

Evolution of the Parochial District.

Almost from the first advent of the Roman priest in Britain began the process of building or reconsecrating local churches and the adoption of the townships or marks as districts of the officiating clergy. For a time, however, the bishops and their assistant priests led coenobitical or monastic lives; but not according to the strict rule of St. Benedict. And this was in accordance with the usual practice of the early Christian missionaries elsewhere among uncivilized or dangerous tribes. From such central stations the clerks or monks sallied forth on their "circuits" to preach and to administer the offices of religion, each in his own particular district. Such a circuit or area was called a *scriftscir*,[1] or shrift-shire, but it is not regarded as the basis of the parish. It had no organic significance for the people within its limits; but the entire territory under supervision of the clergy of the station or minster — the diocese or *mynster-scir*[2] — was a unit for the collection of oblations and for the spiritual jurisdiction. The circuits were merely convenient areas designed to facilitate a division of labor among the priests of the station.[3]

This state of things could not long endure. With the spread of the conversion and the expansion of settlements there would gradually arise on the part of the various communities a demand for local churches and separate territorial organization. The creation of parishes in England has

[1] Canute's *Canons*, 6, 9: Thorpe, II, 244, 246; Aethels., II, 25; Aethelr., V, 12; Canute, I, 13: Schmid, 146, 222, 262; Anhang, I, 42, p. 366. Cf. Selden, *On Tithes*, 252.

[2] Aelfred's *Baeda*, V, 19, III, 19. See Toulmin Smith, *The Parish*, 24, note. On the whole subject of the origin and original names of the parochial districts see Pearson, *Historical Maps*, 55–9, who regards the parish as identical with the ancient mark and tithing.

[3] On the early stations see Selden, *On Tithes*, 151–5; Kemble, *Saxons*, II, 414 ff.; Baeda, *Ecc. Hist.*, III, 17, 26, IV, 27: Bohn ed., pp. 135, 161, 226; Bohn, *Pol. Cyc.*, III, 451; Stubbs, I, 222.

been ascribed both to Honorius,[1] Archbishop of Canterbury, 627–653, and to Theodore of Tarsus, 668–690. But the *parochiae* mentioned in connection with the former were probably the dioceses or districts of the bishops just referred to. For the word *parochia* was used in early days for a bishoprick as well as the smaller division;[2] and there seems to be no good authority for assigning their creation to Theodore[3]—the Aelfred of English ecclesiastical history. The establishment of parishes was a gradual process and took place contemporaneously in several different ways. Many churches were founded by the great landed proprietors on their estates; others, in a similar way, on the lands of the bishops and abbots and on the royal domains. Lay foundations seem to have been very numerous; and the founders, as a condition of acceptance, were required to endow each church with a glebe or parochial estate, receiving in return the right of patronage.[4] In this way some parishes at a very early day must have become identical with the lordships or dependent townships. It is probable, however, that from the beginning the majority of local districts were becoming parishes in a quite different and less artificial way. According to Kemble, before the advent of Christianity every mark or township "had its *fanum*, *delubrum*, or *sacellum*, as the Latin authors call them, its *hearh*, as the Anglo-Saxons no doubt designated them;" and these temples, in accordance with the "well-grounded plan of turning the *religio loci* to account," were converted by the missionaries into baptismal churches.[5] By

[1] Joscelin, *Hist. of Archbishops of Canterbury*, according to Selden, *On Tithes*, p. 256.

[2] Bingham, *Origines*, III, 37, 208; Selden, *On Tithes*, p. 257–9.

[3] Lingard, *Hist. and Antiquities of A. S. Church*, I, 158.

[4] Selden, *On Tithes*, 259 f.; Kemble, *Saxons*, II, 419–23; Lingard, *Hist. and Antiquities of Anglo-Saxon Church*, I, 156–7. Baeda, *Ecc. Hist.*, V, 4, 5, I, 33, II, 14, III, 7: *Mon. Hist. Brit.*, pp. 251, 144, 165, 179, furnishes examples of foundations by king and lords.

[5] Kemble, *Saxons*, II, 423 f. As proof he collects Baeda, *Ecc. Hist.*, III,

the time of Baeda (673–735), it is thought,[1] parish churches had been generally established; and, without doubt, before the Norman Conquest the parochial system had been extended throughout the kingdom.[2]

Growth of the Constitution.

The evolution of a distinct organization and of special functions for the parochial community as such must have proceeded very slowly from the beginning. But little can be said with regard thereto until the thirteenth century. The parish was, of course, the area for the collection of tithes and for the expenditure of the portion devoted to the fabric or the poor.[3] The mass-priest[4] was at first the only officer. Besides his spiritual duties he discharged several important civil functions. He was custodian of weights and measures. "With his rod were decided all disputes respecting the measurement of field-labour."[5] By law he was constituted a sort of notary public in the witness of bargains;[6] and he was practically one of the most powerful peace officers of the township. It was the duty of his spiritual office to shield the weak from the oppression of the strong, and to act as general arbiter and peace-maker in

3, 22, 30, IV, 27. Cf. Selden, *On Tithes*, 351–2; Stubbs, I, 227; Bohn, *Pol. Cyc.*, III, 451. See, however, Haddan and Stubbs, *Councils*, III, 30, where Gregory enjoins Aethelberht to destroy the fanes: *idolorum cultus insequere, fanorum aedificia everte.*

[1] Kemble, *Saxons*, II, 425.

[2] See further on growth of the parish, Lappenberg, *Anglo-Saxon Kings*, I, 248–9.

[3] On the first authorization of tithes by law in England and elsewhere, see Selden's treatise; Stubbs, I, 228 ff.; Lingard, I, 181 ff.; Kemble, II, Chap. X; Spelmann, *Larger Work of Tithes*, English Works, 69–154.

[4] The Saxon word *preost* was used for "any, even the lowest member of the clerical body: he who had received the order of priesthood was distinguished by the prefix *maesse:* he was the *maesse-preost*, because it was his peculiar office to consecrate and offer the sacrifice of the mass." Lingard, I, 147.

[5] Lingard, I, 171.

[6] Aethelstan, II, 10; Eadmund, III, 5: Schmid, 136, 181.

local disputes. If a person fought or was guilty of any violence at the folkmoot in the presence of a priest, he was liable to a fine, just as he was punished for similar conduct before the ealdorman.[1]

In 1127 at the synod of London[2] churchwardens were instituted to take charge of the church edifice and other property and to see that the priest performed his duty. But the most important fact in the history of the parish was the rise of the vestry[3] meeting which first comes to view sometime in the thirteenth century. The primary cause which led to the development of this body was the same which produced Convocation and the House of Commons: the need of money. Gradually the appropriation of tithes and other ecclesiastical property by the clergy had rendered the ordinary income insufficient for the support of the fabric, necessitating an appeal to the parishioners for voluntary contributions. But the "free gifts" were really made compulsory upon individuals by the denouncement of spiritual penalties. The result was a resort to united action; and thus arose the "church rate" voted in the "open vestry" meeting by the ratepayers themselves—the first example, in the modern sense, of a self-taxing local body.[4]

With the rise of the vestry—another form of the ancient tungemot—the constitution of the parish may be regarded as organically complete. At this point the interrelations of the three institutions—township, manor, and parish—superimposed, so to speak, one above the other, are extremely interesting. The boundaries of the latter were, as a rule, identical with those of a township or group of townships. In the

[1] Aelfred, 38: Schmid, p. 92, where *cyninges preost* is mentioned: any mass-priest is probably meant.

[2] Fonblanque, *How We Are Governed*, 68.

[3] So called from the place of assembly: the sacristy or vestry room of the church: Gneist, II, 614.

[4] On the rise of the vestry see Gneist, II, 613 f.; Chalmers, *Local Government*, 38.

north, particularly, the area of the parish was very great, often comprehending several townships; in the south, it sometimes embraced a number of smaller districts—boroughs, vills, or tithings; the subordinate districts being practically separately organized parishes, differing from the larger body only in not having each a constable and a church.[1] A large portion of the original functions of the township were discharged, as we have seen, in the various courts of the manor. But the powers of the latter, under the influence of the lawyers, came more and more to be strictly defined in the charters. Hence the residue of the civil business of the township and such new functions as were evolved with the progress of society were relegated to the vestry. The point to be carefully noted is the fact that already the parish represented a double principle. On the one side it was a civil township under the headship of the constable. On the other, it was an ecclesiastical body under the presidency of the parish priest.[2] But its lay attributes predominated more and more and thrust the clerical into the background.[3] The old name of "township" is generally used when the "inhabitants," irrespective of jurisdiction lay or temporal, is meant. But there is a wonderful blending of the terminology of the three different institutions. Sometimes in the same passage of judicial opinion or statute, "manor," "parish," and "township" are alternately employed as interchangeable terms; vill and tithing are also used in the same sense.[4]

Differentiation of Offices.

Few things can be of greater interest to the student than the luxuriant growth of assemblies and offices, all springing

[1] Elton, *Ency. Britannica*, XVII, 296; Toulmin Smith, *The Parish*, 33.

[2] Compare Chalmers, *Local-Government*, 37 f.

[3] Toulmin Smith's *The Parish* is an elaborate polemic to vindicate the "purely secular character" of the institution. See particularly Chap. I.

[4] See for examples, Toulmin Smith, *The Parish*, 47–8, note, 52, 16. Cf. Elton, *Ency. Brit.*, XVII, p. 295; Adams, *Norman Constables*, 14 ff.

from the simple mechanism of the ancient mark. In the courts baron, customary, and leet; in town-meeting or vestry, each inhabitant was judge or legislator. In place of the two or three officials of the old township, we find a formidable series of parish functionaries.

The minister—rector, vicar, or incumbent—was the spiritual head of the community. And in acknowledgment of this dignity, he enjoyed the honorary privilege of presiding in the vestry meeting—that function in his absence, devolving upon an elected chairman, usually the senior churchwarden.[1] Moreover, from an early day, the minister has performed important civil duties as ex-officio registrar of births, deaths, and marriages.[2]

But the constitutive officer of the parish, in its civil capacity, was the constable who appears under a great variety of names.[3] It became a maxim of the common law that "where there is a constable there is a parish."[4] He was an elective officer; and it is a curious illustration of the intermingling of institutions that sometimes the election took place in the manorial court leet, sometimes in the vestry meeting.[5] In ancient times, the constable was the most important peace magistrate and, as a rule, the post was filled by the most respectable men of the neighborhood.

Next to the constable in importance were the churchwardens. These may be regarded as a sort of connecting link between the lay and ecclesiastical sides of the parish. But they were

[1] Gneist, II, 614, 617, 625; Toulmin Smith, *The Parish*, 58, 292, 288, who insists that the minister can only preside by consent of the body: he is a mere "individual" of the parish.

[2] Smith, *The Parish*, 187–89.

[3] Lambard, *Eirenarcha*, 14, uses "petie constable," "borsholder," "borowhead," "thirdborow," and "tithingman" in the same sense to "signifie the chiefe man of the free pledges within that borow or tything." For other designations see *Ib.*, *Duties of Constables*, 4 ff.

[4] H. B. Adams, *Constables*, 14–15, *Tithingman*, 12; Selden, *Table Talk* (Arber), 83; Toulmin Smith, *The Parish*, 16 note, 120.

[5] Toulmin Smith, *The Parish*, 125 f.; Gneist, II, 50.

created as lay guardians of the church building and the treasures therein deposited; and, from a legal point of view, they have always been regarded as civil officers.[1] Churchwardens were originally chosen—usually two for each parish—in the open vestry; but by the canons of 1603 the right of election was lodged jointly in the vestry and minister.[2] Their duties have been divided into two groups—ecclesiastical and lay;[3] but both classes are, in reality, of a temporal character, being chiefly concerned with protecting the interests of the community in the ecclesiastical property.[4] They were curators of the church building and other realty, formed a corporation for the management of the movable property of the church, and performed various police functions laid upon them by statute. But their most important duty was the making of the church rate and the calling of the vestry to authorize the levy. The churchwardens were, in fact, the fiscal officers of the parish, and, as such, were required to render an annual account to the vestry.[5]

Two other important officers were the parish clerk and the

[1] Toulmin Smith, *The Parish*, 68 ff., insists upon this. The churchwarden constitutes a lay corporation. Lambard, *Constables*, 71, 74.

[2] Toulmin Smith, *The Parish*, 72 ff. It has been decided that, in case of disagreement, the parson shall choose one and the ratepayers, the other: Chalmers, *Local Government*, 48; Gneist, II, 618.

[3] Gneist, II, 618–23; *Selfgovernment* (1871), 657.

[4] Lambard, *Duties of Constables*, p. 72: "And for as much as these churchwardens bee Officers, put in trust for the behoofe of their parish, therefore also are they not enabled with any other power, then for the good and profit of the parish. So that churchwardens can neither give away, nor release at their own pleasure the goods of the church. For if the Parishioners shall finde that they doe unprofitably wast, or mispend the goods of the Parish, then may they remove such Churchwardens, by making their choice of new." Burn, *Ecc. Law*, I, 398. See Edward Peacock's *Notes on the Churchwardens' Accounts of the Parish of Stratton, in the County of Cornwall, Archaeologia*, Vol. XLVI, 195–236. This record, prefaced by an interesting account of the church revenue, extends from 1512–1547.

[5] On the whole subject, see Lambard, *Constables*, 69–82; Wood, *Institute*, 92–98; Burn, *Justice*, 128–34; Burn, *Ecc. Law*, I, 397 ff.; Stephens, *Laws of Clergy*, I, 331 ff. See the last note.

vestry clerk. Both were originally elected in the vestry meeting, and both are, in theory, temporal officers.[1] But the parish clerk was not clerk of the parish, the latter function being discharged by the clerk of the vestry. Indeed he was not "clerk" at all in the modern sense.[2] In its origin the office was spiritual and the incumbent was probably always a clerk in holy orders. But since the Reformation it has become temporal, though it may still be held by a parson in orders; and certain secular duties have been imposed upon it by statute. For example, the parish clerk is depositary of "parliamentary notices and other important documents."[3] The office is now often united with that of sexton.

On the other hand, the vestry clerk is the real secretary of the parish. Theoretically he is elected for a single meeting, but in practice the post is held by the same person for a year. Many rural parishes have no vestry clerk; and in such cases the minutes are recorded by one of the churchwardens or by the minister.[4] This office is of peculiar interest as being the prototype of our township clerk.

Minor officers of the parish were the beadle or vestry messenger, the sexton, waywardens or surveyors of highways,[5] collectors of taxes, and auditors of accounts: all these were elected by the ratepayers in vestry assembled. Originally other officers, such as the "common driver" and the "hay-

[1] Under authority of the canons of 1603 the parish clerk is often appointed by the minister; but in some parishes the office is still elective. Toulmin Smith, *The Parish*, 198 ff.; Bohn, *Pol. Cyc.*, III, 453–4.

[2] Toulmin Smith, *The Parish*, 197 ff.; Bohn, *Pol. Cyc.* III, 453–4. Gneist, II, 623–4, confuses the two offices; but the error is corrected in *Selfgovernment* (1871), 663 ff.

[3] Toulmin Smith, *The Parish*, 203.

[4] Toulmin Smith, *The Parish*, 204 ff.

[5] Other names are "waymen," "supervisors of highways," "overseers of highways." All these terms appear in the records of a single parish—those of Steeple Ashton in Wiltshire, 1542 onward. These records furnish admirable illustration of the growth of the parish constitution. See the extracts in Toulmin Smith, *The Parish*, 491 ff.

ward," or watcher of bounds and enclosures, were chosen in the court leet.

By the famous act of 43 Elizabeth the care of the poor was assumed as a public burden, and the administering of the law laid upon the parish. For this purpose the churchwardens were made ex officio overseers of the poor to act conjointly with other special overseers, two or more from each parish, appointed "under the hand and seal of two or more justices of the peace." But the overseers like the earlier "collectors" and "distributors" of alms, were probably elected by the parishioners and then formally "inaugurated" by the justices.[1] The board of overseers were authorized to lay and assess a "poor-rate," and expend it in accordance with the provisions of the act, for the benefit of those entitled to alms. Before this time the constable's office had gradually fallen into decay, and with the acquirement of these powers of overseer, the churchwarden began to rank as official head of the parish. Moreover many police and executive duties were laid by statute upon both overseers and churchwardens; so that from the beginning of the seventeenth century the constabular duties of the ancient tithingman were shared among three sets of officers.[2]

The Open Vestry.

The vestry meeting was a genuine folkmoot in which all who paid scot and lot had equal voice. Even villeins could participate in its deliberations.[3] It was a local legislature in which were enacted by-laws touching all matters of public concern. The meeting was formerly called by the constable; but with the gradual decline of that office the duty has long

[1] Toulmin Smith, *The Parish*, 145–6.

[2] Gneist, II, 614, 622–3. Churchwardens and constables were also often appointed conjointly for the same duties. See examples in Lambard, *Constables*, 81 f.

[3] Toulmin Smith, *The Parish*, 52.

since devolved upon the churchwardens.[1] "On account of the gathering of all weekly in the church, the custom grew up of notice being always given there, in the middle of the service. The old custom further was—which prevailed, indeed, till the close of the last century—to hold the parish meeting on Sunday, after church."[2] Vote was by show of hands or by division in case of disagreement. In the management of the parish affairs, important use was made by the vestry of the principle of representation through the appointment of committees. Interesting examples of such committees were the ancient "sidesmen," "synodsmen," or "questmen," whose duty it was to appear instead of the whole people, as originally, at the synods or ecclesiastical visitations, and make presentment or "give information on oath concerning the manners of the people;"[3] the "jurats" or sworn arbiters in private disputes; and the committee of "watch and ward" consisting of the constable or "provost" and four inhabitants annually chosen as his assistants or advisers. Besides these were the committees of "assistance" and "assessment"—both of which will be again referred to—and various other committees called into being by recent statutes to carry out the requirements of the modern sanitary and economic systems.[4]

In addition to its general functions as a local self-governing body, the parish was employed as the unit of the county and national administrations. For ages the reeve and four appeared as the representatives of their township in the county court; and, unless excused as having a court leet of their own, the parishioners as a body were bound to attend the sheriff's tourn for view of frankpledge. The parish was also used as a military district for the levy of troops and arms;[5] and, what

[1] Toulmin Smith, *The Parish*, 55.

[2] Toulmin Smith, *The Parish*, 53.

[3] Bishop Gibson, *Visitations* (1717), 59–61, cited by Toulmin Smith, *The Parish*, 70–71.

[4] All these are discussed in Smith, *The Parish*, 229–65; Gneist, *Selfgovernment* (1871), 675–7.

[5] Toulmin Smith, *The Parish*, 18.

is of more importance, it was the initial area for the collection of imperial taxes.[1] The assessment in each parish was originally made by four or more sworn men—a part of the system of assessment by juries inaugurated by Henry II.[2] Thus arose the "committee of assessment" consisting of the "reeve and four," or other persons chosen by popular vote.[3]

The Select Vestry.

The most important innovation in the history of the parish was the rise of the "select vestry." At the beginning of the seventeenth century it was already customary to appoint a committee of "Assistance," composed of former or "passed" officers, whose duty it was, in the intervals between the meetings of the vestry, to advise the officers for the time being in the management of the parochial affairs. This committee was elected annually in open vestry. But in many parishes the assistants gradually usurped the power of filling vacancies in their number by co-optation, thus becoming close corporations. These were then called "select vestries," reminding us of the "select" or "governing" bodies which, during the same period, were gaining control of the boroughs. The open vestry, in some instances, was entirely superseded so that at length an institution which began in aggression was rendered legal by prescription; and many similar bodies were created by statute. Thus an oligarchy appears in the parish simultaneously with the despotism of Laud and the Stuarts in national affairs.[4]

[1] Stubbs, II, 213, 422, gives examples; Toulmin Smith, *The Parish*, 17, 20, 21, 27–28.

[2] Stubbs, I, 586.

[3] Stubbs, *Select Charters* (1232), p. 360 f. Here the four who act with the reeve are elected: *Ib.* (1237) p. 366 f. The four assessors are also elected. Cf. Toulmin Smith, *The Parish*, 230, 231. See below, Chap. IV, VI, (*a*).

[4] On the rise of the select vestry see Gneist, II, 627–9, *Selfgovernment* (1871), 674, 704, who thinks the leet jury may sometimes have been the origin. Toulmin Smith, *The Parish*, 229, 237 f.

(*b*).—*The Modern Civil Parish.*

The ancient parish may be regarded as one body discharging two kinds of functions—the one temporal, and the other spiritual. In other words, for a long time, the units of the lay and ecclesiastical systems were identical in respect both to territory and organization. But gradually during the last two hundred and fifty years has been effected an almost complete separation of the civil from the spiritual body. The beginning of the differentiation may perhaps be found in the enactment of the great poor law of 1601. From its origin, at that time, the poor rate became constantly a matter of more and more concern to the community. Year by year the burden of taxation for relief of the poor was increased, until in the beginning of this century it had assumed almost incredible proportions.[1] And over the levy and administration of this fund the parish exercised no real control. True, the churchwardens were elected by the ratepayers; and probably the other overseers were nominated by them. But the board as thus constituted was practically irresponsible. They levied and assessed the poor rate without vote of the people, and were only directly accountable for their administration of it to the justices of the peace who represented the landed gentry rather than the ratepayers at large. The care of the poor, which gradually thrust all other parochial interests into the background, was thus a mere "appendage"[2] of the parish; and this fact was the underlying reason for rearranging parish boundaries for civil purposes. Mr. Chalmers assigns two sets of causes for the separation of the civil from the ecclesiastical parish. On the one hand, "under the powers given by numerous Church Building Acts, populous parishes have, for ecclesiastical purposes, been sub-divided into distinct parishes. This division has not affected the parish in its civil aspect. The

[1] Gneist, II, 656, gives the amounts.
[2] Gneist, II, 629.

lay causes have been more complicated. In the first place, outlying townships of large parishes seem long ago to have acquired by custom the right of appointing separate overseers, and of being separately rated for the poor rate. By an Act of 1819 this customary separation from the mother parish was confirmed in the case of all places which had enjoyed the right for sixty years, but the fresh creation of parishes by custom was forbidden. Secondly, the same end was in certain cases arrived at by direct legislation. An act in 1662, after reciting the largeness of the parishes in some northern counties, provides that in every township or village in these counties there should be separate overseers. Again, by custom there were certain places, originally perhaps marsh or forest lands, which were extra-parochial. By virtue of two acts passed in 1857 and 1868, these extra-parochial places have been merged in adjoining parishes. The meshes of the poor law net now cover the whole of England, and no ratable person, however slippery, can elude them. Another series of statutes has provided for the merging of detached parts of parishes in parishes with which they are contiguous. As a result of these various causes, about one-third of the civil parishes have no connection with ecclesiastical parishes."[1] The civil parish always either forms a sub-division of a poor law union, its boundaries never intersecting the boundaries of the latter, or it constitutes a union of itself.[2] But according to the report of a select committee appointed in 1873, it bears no definite relation to any other territorial area. "A parish may be situated partly in one county, partly in another; partly in a county, partly in a municipal borough; partly within the jurisdiction of a local board, partly without."[3] Many still have detached portions, separated by a considerable distance, and intermingled with the lands of other parishes. Formerly the boundaries of

[1] Chalmers, *Local Government*, 39–40.

[2] There are 649 unions, of which 25 are single parishes. Chalmers, 51.

[3] Chalmers, *Local Government*, 33.

all parishes were ascertained and preserved by annual "perambulation" of the inhabitants; but by the poor law act of 1844, it seems to have been intended that the perambulations should be made but once in three years.[1] Parishes vary greatly in size. Many have an area of less than fifty acres; others contain over ten thousand acres. Some have a population of less than fifty; others of more than one hundred thousand.[2]

The parish is now of little importance as an administrative unit. One by one its functions in this respect have been taken away and given to other bodies. But it remains the unit for taxation, all rates being collected parochially; and it is also the district for preparing the list of voters for parliamentary and municipal elections. "Civil parish" and "poor law parish" are now practically interchangeable terms.[3]

The official corps of the parish has undergone some important changes in recent times. The minister may still preside in the vestry meeting and he has duties connected with registration. The office of constable—once the civil head—is now practically extinct. The principal officers are at present the overseers of the poor. These are nominated annually by the justices of the peace; and when the civil parish is also an ecclesiastical parish, the churchwardens are still overseers. Overseers are unpaid; but assistant overseers may be elected by the vestry and receive salaries payable from the poor rate. Since 1834 the overseers have had no share in the administra-

[1] Chalmers, *Local Government*, 33–4. On perambulations see Toulmin Smith, *The Parish*, 542–51, and Chap. IV, IX, (*b*), below.

[2] Several in Northumberland have but 5 or 6 persons. Chalmers has the following note: "Mr. Fry mentioned a parish in which there was only one ratepayer. That man may well say *L'état c'est moi*. He must rate himself. Presumably he is the overseer, the vestry, the chairman of the vestry, and the guardian. When he meets himself in vestry we may surmise that he takes the opinion of the meeting by show of hands. It may be an open question whether he might not constitute himself the burial board and bury himself." *Local Government*, 34, note 1.

[3] Chalmers, *Local Government*, 32, 40.

tion of the poor relief, that business having devolved upon the guardians; but they may order relief to be given in urgent cases. Their chief duties now consist in making out jury lists, preparing and publishing lists of voters, and lists of claims and objections, and assessing and collecting the poor rate. Every parish elects at least one guardian, who, however, has no duties separate from his functions as member of the board of guardians for the union in which the parish is situated. And the union, in its turn, is entirely under the control of the Local Government Board.

Other officers are the vestry clerk, waywardens, and collectors of rates; the latter elected on application of the guardians.

The vestry is still the most important institution of the parish. By a series of acts its organization has been largely remodelled during the present century.[1] At present a vestry may be either "common" or "select." The common vestry consists of all ratepayers, whether resident or non-resident; and women, if contributors, enjoy the right of suffrage. Vote is by show of hands or by poll. Select vestries are either "customary" or "statutory." The latter were created by the Hobhouse Act, 1831, and are now of little importance. The former are the old oligarchic bodies whose origin has already been described, and which have remained untouched by every statute that has yet appeared.

In conclusion it may be noted that the name *parish* is now applied to several other administrative districts. Such are the "land-tax parish," the "burial acts parish," and the "highway parish." The boundaries of these districts do not necessarily coincide, one with another, or with those of the poor law parish.[2]

[1] The "General Vestries Act," 58 George III; the "Select Vestries" or "Sturges Bourne's Act," 59 George III; and the "Hobhouse Act," 2 William IV, c. 60. On these see Gneist, II, 629–37.

[2] On the civil parish see Elton, *Encyc. Brit.*, XVIII, 296; Chalmers, 32–45; Gneist, II, 625–723, *Selfgovernment*, 684–769, where the entire poor

(c.)—*The Modern Ecclesiastical Parish.*

Through the operation of causes already mentioned the area of the ecclesiastical parish, in many cases, no longer coincides with that of the civil. A hamlet, for example, may lie in one parish for civil and in another for spiritual purposes. In 1871, according to Chalmers, there were in England 14,945 civil and 13,000 ecclesiastical parishes. Of the civil parishes not more than 10,000 corresponded in boundaries with ecclesiastical parishes of the same name.[1] Compulsory church rates were abolished in 1868, and since that time the ecclesiastical parish has been of comparatively little importance as an instrument of local government. "It is almost entirely a permissive institution." But for more than two centuries preceding, the ecclesiastical parish was an organization of great significance to every inhabitant. "Besides," says Mr. Chalmers, "though an English citizen owes but few duties as an ecclesiastical parishioner, he has some important general rights in that capacity which the law will give effect to. In the theory of the English law every Englishman is a member of the Church of England. The privilege of dissent is conferred on Englishmen by a long series of statutes, each dealing with a particular point and removing some special grievance, but by the exercise of dissent an English citizen does not forfeit his legal rights as a member of the national church; he is only relieved from certain corresponding and irksome duties which were formerly imposed upon him. It must not be forgotten that dissenter and churchman alike pay tithes both ordinary and extraordinary."[2]

relief and vestry legislation is discussed at great length. Cf. also Nicholls, *Hist. of Eng. Poor Law*, II, 192 ff. passim; Pashley, *Pauperism and Poor Laws*, 257 ff.; Toulmin Smith, *The Parish*, contains much criticism of recent innovations.

[1] Chalmers, *Local Government*, 35, 39. Cf. Brodrick, *Local Government in England*, 12 f.

[2] *Local Government*, 45, 46.

The vestry is the legislative and administrative body of the parish. Legally it is defined as "an assembly of the minister, churchwardens, and parishioners." Though compulsory church rates have been abolished, their validity is still acknowledged by statute, and they are still voted by the vestry. In case of default in payment, a person is not allowed a vote as to the expenditure of the money derived therefrom. "Church rates therefore form an apt illustration of what lawyers designate a duty of imperfect obligation—that is to say, a duty recognized as such, but enforced by no sanction."[1]

The minister—rector, vicar, or incumbent—is the spiritual officer of the parish. As parson he constitutes a corporation sole, and has a freehold right in the glebe, churchyard, and, for some purposes, also in the church building. Besides his clerical duties he is required, as already mentioned, to register all baptisms or marriages at which he officiates, and all burials which take place in his churchyard; and for the latter he receives the fee, whether he officiates or not.[2]

The churchwarden is the principal civil officer of the ecclesiastical parish. Any ratepayer is eligible whether or not a member of the Church of England, only peers, members of Parliament, and certain professions being exempt. Acceptance of the office is compulsory; and even Jews have been elected to the place.[3] It is still the duty of the churchwardens to estimate the amounts needed from time to time for repairs and summon the vestry to make the rate. When the civil parish is also an ecclesiastical parish, the churchwardens are ex-officio overseers. This fact together with the circumstance that the minister still enjoys the honorary privilege of presiding in the vestry meeting of the civil parish, furnishes an interesting survival of the former identity of the temporal and spiritual bodies.

[1] Chalmers, *Local Government*, 46.
[2] Chalmers, *Local Government*, 47.
[3] Fischel, *Eng. Const.*, 346.

Other lay officers of the ecclesiastical parish are the parish clerk, and the sexton. The former office may now be conferred upon a curate, and its only surviving civil function is the care of "certain maps and documents required to be deposited with him before certain public works are begun."

Of the office of sexton Mr. Chalmers states that it is "remarkable as being probably the only ecclesiastical preferment which may be bestowed upon a woman. The point was argued in the court of King's Bench and the judges solemnly decided—first, that a woman was eligible; and secondly that women who were ratepayers might vote at the election. The *ratio decidendi* is not complimentary. On the first point the court felt no doubt; on the second the court hesitated, but eventually upheld the right of women on the ground that 'this being an office that did not concern the publick, or the care of and inspection of morals of the parishioners, there was no reason to exclude women who paid poor rates from the privilege of voting.'"[1]

[1] *Local Government*, 50.

CHAPTER II.

RISE OF THE NEW ENGLAND TOWN.[1]

I.—Restoration of the Mark.

It was the parish of the Stuarts, already in some places passing into the hands of an irresponsible oligarchy, the select vestry, with which the pioneers of New England were acquainted. But it was not this institution which they introduced into the new world. In the transplanting of English

[1] The Germanic origin of New England towns has already been thoroughly treated by Dr. Adams, in co-operation with other scholars. Dr. Levermore's *Republic of New Haven* has revealed to us the entire history of a model community from its first planting in the wilderness to its present flourishing condition as a populous city. In like spirit Prof. Fiske of Cambridge has traced the development of the town-meeting, emphasizing its special mission in the growth of the federal union.

It will therefore be the primary object of the ensuing sketch to present a somewhat more detailed analysis of the township constitution than has yet appeared. The following typical records have been used: Boston *Records* (both of the town-meeting and of the selectmen), 1634–1701, 2 vols.; Boston *Town Records*, 1701–1777, 5 vols.; *Records of the Boston Selectmen*, 1701–1753, 4 vols.; the Boston *Book of Possessions;* Charleston *Land and Church Records;* Roxbury *Land and Church Records;* and the Dorchester *Town Records.* The foregoing are all comprised in the *Reports of the Boston Record Commission.* The following have also been consulted: Braintree *Town Records*, 1640–1793, edited by S. A. Bates; Wenham *Town Records*, extracts from, edited by Wellington Pool: in *Hist. Coll. Essex Inst.*, Vols. XIX–XX; Worcester *Town Records*, 1740–1783, and the *Records of the Worcester Proprietors*, both edited by F. P. Rice: in *Procds. Worcester Society of Antiquity;* Groton *Town Records*, 1662–1678, edited by Dr. S. A. Green; Salem *Town Records*, 1634–1659, edited by W. P. Upham: in *Hist. Coll. Essex Inst.*, Vol. IX; Newark (N. J.) *Town Records*, 1666–1836: in *Coll. N. J. Hist. Society*, Vol. VI; *The*

local organisms to American soil, two remarkable phenomena attract attention. On the one hand there is so much that is new in constitutional names and functions, so much of original expedient and experimentation, as to render New England town government almost unique, while, at the same time, its continuity in general outline with that of the mother country can be plainly discerned. On the other hand occurs a most interesting example of institutional retrogression. Many features of the primitive village community are revived. The colonists go back a thousand years and begin again; or, to speak with greater accuracy, new life is infused into customs which, though passing into decay, are yet not wholly extinct in the old English home. All this is perfectly natural: it is a case of revival of organs and functions on recurrence of the primitive environment.

Early Records of Rowley: in *Hist. Coll. Essex Inst.;* XIII; and the New Hampshire *Town Papers*, XI–XII.

Besides these, the *Colonial Records* of Massachusetts, Rhode Island, New Haven, Connecticut, and Plymouth, the *Acts and Resolves* of the Province of Massachusetts Bay, edited by Ames and Goodell, and the New Hampshire *Province Records* and *Court Papers:* in *Coll. New Hamp. Hist. Soc.*, VIII, 1–303, are of the utmost importance.

The *Collections* of the Rhode Island, New Haven, and New Hampshire Historical Societies, the *Collections* of the Essex Institute, and, particularly, the *Collections* and *Proceedings* of the Historical Society of Massachusetts, all contain much valuable matter bearing upon the subject. But it is noteworthy that the great majority of these documents, however precious for the general historian, yield little or nothing for local institutions; and the same is substantially true of most of the writings of the Colonial era.

Among the innumerable ancient and modern town and county histories, Bell's *History of Chester, N. H.*, in *Coll. New Hamp. Hist. Society*, VII, 345–413; Paige's *History of Cambridge;* Bailey's *Historical Sketches of Andover;* Nourse's *Early Records of Lancaster, Mass.;* and Freeman's *History of Cape Cod*, will be found especially useful. Joel Parker's *Origin, Organization, and Influence of the Towns of New England*, in *Mass. Hist. Soc. Proceedings*, IX, and the chapter on the township in Tocqueville's *Democracy in America*, I, should also be read. On the sources of New England history see the critical essays in Vols. III and V of Winsor's *Nar. and Crit. Hist. of America;* and for an extended bibliography of *American Local History*, see *Bulletins* of Boston Public Library, Nos. 65 ff.

In the first place it is interesting to observe that, in the choice of a name for their communities, they returned unconsciously to the usage of Ine and Wihtraed. From the beginning *town*, the *tun*[1] of the early laws, was the ordinary popular as well as legal designation. Not only was the village proper so called, but the name was also usually applied to the whole territorial domain of the community. Only when it was necessary to distinguish the group of homesteads—the *Dorf*—from the entire *Mark* was "township" ordinarily employed.[2] The term *parish*,[3] on the other hand, was used for the community as a religious body, although *society* was sometimes employed instead.

But the most striking illustration of this social retrogression is the revival of the primitive village community in some of its most characteristic features. Everywhere in New

[1] In the early English codes *tun* occurs more frequently than *tunscipe* as a name for the village settlement.

[2] A careful examination of the early town and colonial records most certainly confirms this view. For example, in the *Mass. Col. Records township* rarely occurs, while *town* and *plantation* appear on almost every page. But in the 18th century *township* was frequently employed in the statutes. See *Acts and Resolves*, I, 642, 676, 684, etc., for various acts incorporating townships, where the word is used interchangeably with *town*.

[3] In the public laws the name *parish* was given to a portion of the township "set off" for the maintenance of its own minister; and for this purpose it was a complete *parish* with its own officers; but the word was used interchangeably with *precinct* and *district*. See *Acts and Resolves* I, 182, 183, 506, etc., II, 99, 617, 687, etc. Sometimes the subdivision of the township into parishes was the first step in the differentiation of new towns. See the interesting note by Dr. Levermore in *Rep. of New Haven*, 327–9, where three distinct stages in the growth of a community are traced from the records: 1. A temporary or "winter" parish. 2. A society or complete parish. 3. The incorporation of the parish as a town—Naugatuck—by legislative enactment. The old parish records, some of which are now in print, constitute most interesting supplements to those of the town itself. See, for example, the *Roxbury Church Records*, in the 6th report of the Boston Record Commission; the records of the First Church at Salisbury, Mass., in Vol. XXI, *Collections of Essex Institute;* and the records of the Fifth Parish of Gloucester, *Ib.*, Vols. XXI and XXII.

England appeared the house-lots or village mark, the common fields for cultivation, the common meadows and pastures, and the undivided mark or waste.[1] And, as in ancient times, when a new tract was taken possession of by a community, a portion of it, to be held in severalty, was apportioned by lot among its members, usually according to the "proportion of estate" and the "number of heads" in each family.[2]

Several other interesting features of primitive Teutonic life were reproduced in the New World. Such, for instance, was the jealous watchfulness with which the community sought to control its own membership and the disposal of communal rights. Restraint was put upon the alienation of the "house lots," particularly to strangers, though these lots were theoretically granted in severalty. This was entirely consistent, since all common rights in the outlands were usually conveyed with the individual holdings within the town.[3] This right of control, generally exercised by the New England towns, was practically equivalent to the *Vorkaufsrecht* or right of pre-emption prevailing in the European Mark-societies.[4] The town records contain many orders relating to the sale of private holdings; and fines for selling to strangers without permission were frequently imposed. For example:

"It is agreed that if any man shall desire to sell his part of impaled ground, he shall first tender the sale thereof to the town inhabitants interested, who shall either give him the

[1] The system of common cultivation and common ownership of lands, however, was not entirely extinct in England and would there survive for a century to come: Stubbs, *Const. Hist.* I, 84.

[2] The plan in New Haven: see Levermore, 81. This was perhaps most common, but various other methods were adopted. See Eggleston, *The Land System of the New England Colonies*, 42 ff., 52.

[3] This was the rule in the German Marken: Maurer, *Einleitung*, p. 147.

[4] See Maurer, *Dorfverfassung*, I, 320, cited by Eggleston, 49, who has discussed this topic. See also Maurer, *Einleitung*, 157: sale must be public and each Genosse had Naherrecht or right of pre-emption. Cf. *Ib.*, 205 f.

charge he hath been at, or else to have liberty to sell it to whom he can."[1]

In 1669 the town-meeting of Wenham decided that—"All o^{r} Co$\overline{m}$on shall be eaqually Deuided betwixt the Settld Inhabitants in the towne viz. to the Dweling houses now inhabitants by Equall p'tons to be & Remaine to the Vse of such Habitatons alwayes p'uided that no p'son nor any after him in his right fenc in his or theire p'priety for pasture, but shall ly open to the Vse of the publique for feeding, only that which is Capeable of Breakeing Vp or makeing medowe, which may be fenced in at Eury mans descreton nor shall any p'son or p'sons in o^{r} towne have liberty or any after them in his or their right to sell or Conuey any such theire portons to any p'son without the Consent of the towne from time to time."[2]

As a rule the right to control the alienation of lands belonged to the towns; but in Connecticut the principle of local pre-emption was enforced by an order of the general court.[3]

In many of the New England village communities arose, in the course of time, a sharp distinction between the "proprietors" or "commoners" and the "new comers" or "non-commoners." The latter were usually admitted as "inhabitants" of the town and possessed full political rights, but were denied a share in the common lands which were monopolized by the former, and this led sometimes to a protracted struggle on the part of the plebeian non-commoners to wrest from the

[1] Records of Cambridge, from Paige's *Hist. of Cambridge*, 10. See other similar orders, *Ib.*, 20, 40.

[2] *Town Records of Wenham* in *Coll. Essex Inst.*, XX, 142. See also *Dorchester Records*, 8; *Boston Town Records*, 1634–60, pp. 10, 11, 12, 97, etc.; and other examples in Eggleston, 49–59; and Levermore, 79, 105.

[3] *Conn. Col. Rec.*, I, 351, cited by Eggleston, p. 49. In Massachusetts the question was raised in 1637, but no action seems to have been taken: *Mass. Col. Rec.*, I, 201. In Rhode Island alienation of land to persons of another jurisdiction was forbidden: *R. I. Col. Rec.*, I, 126, 401.

patrician land owners a share in the public domain.[1] In these two classes we at once recognize the *Märker* or *Genossen* as opposed to the *Ausmärker*, *Uthmanne*, or *Beisassen* of the German mark societies.[2]

Equally interesting was the recurrence in the New World of the *Mutter* and *Filialdörfer* of which so many interesting illustrations have been given by von Maurer.[3] Everywhere companies of pioneers were constantly separating themselves from the parent town, either to seek homes in other jurisdictions, or to plant new settlements in their own outland; the latter communities, for a time, usually occupying a subordinate position.[4]

Finally the archaic type of New England Society is revealed by its astonishing publicity. The majority in town-meeting assembled, or through their representatives in the general court, exercised a supervision over personal conduct and many of the transactions of private business, almost painfully minute; witness the marvelous subdivision of public duties and the incredible number of local functionaries.[5] Though this social

[1] Notably in Salem: see Dr. Adams' *Village Communities*, 63–79. Cf. Eggleston, 40. See also an order of the Boston town-meeting, 1646, granting all inhabitants at that time equal rights of commonage, but denying such rights to those admitted as inhabitants thereafter: *Boston Records*, 1634–60, p. 88.

[2] Also styled *Ausleute*, *Uthmarkesche*, *Butenleute*, *Ausholzer*, *Unholte*, etc. See Maurer, *Markenverfassung*, 115–24; *Einleitung*, 1; *Dorfverfassung*, I, 135–88; II, 43–44; Laveleye, *Prim. Prop.*, 120.

[3] *Markenverfassung*, 16–19; *Einleitung*, 174–81. Thoroughly illustrated in the case of New Haven by Dr. Levermore.

[4] Thus Boston long elected constables for Muddy River (Brookline) and Rumney Marsh: see *Boston Town Records* at minutes of annual elections, and an interesting sketch of Muddy River and its incorporation as an independent town—a "peculiar or village"—by name of Brookline, in 2 *Mass. Hist. Coll.*, II, 145. The general court of Massachusetts often appointed the constables for new townships: *Mass. Col. Rec.*, I, 76, 79, 96, 101. Plymouth chose constables for her daughter plantations: *Plym. Col. Rec.*, I, 21, 36, 48, 54, etc.; cf. Dr. Adams' *Norman Constables*, 21 ff. The same right was exercised by New Haven: Levermore, 87–90.

[5] See below on the "Town officers and their functions."

feature may have been intensified by the patriarchal or theocratic sentiments of the Puritans, still it was a remarkable reproduction of one of the most curious phases of old English life. For, "in the simple state of society which existed in the time of our Saxon forefathers, transactions between man and man were conducted with a publicity and openness of which we have no conception."[1]

II.—Relation of the Town to the General Court.

(*a*).—*The Court was the Source of Authority.*

The tendency of legislation at present both in England and the United States seems to be toward a more careful and detailed definition of the functions of all local bodies. In our Western States, at least, it may be laid down as a general rule, that the powers of municipal corporations are exhaustively enumerated in the statutes. It becomes therefore a question of interest and importance to determine, if possible, to what extent the New England towns during the colonial era were the creatures of and dependent upon the general court.

In the first place the grant of the territorial domain of the township was the act of the colonial authority.[2] In Massachusetts, during the early period, committees were usually appointed by the court to "set out the bounds" of a new town;[3] and similar committees were chosen to determine all questions of boundaries between different towns,[4] or to locate grants of land made to individuals.[5] Under the Province

[1] Forsyth, *Trial by Jury*, 71–72.

[2] In Plymouth such grants were made by the governor and assistants. See *Plym. Rec.*, XI, 34–5.

[3] For examples, see *Mass. Col. Rec.*, I, 133, 102 (Dorchester), 157 (Concord), 168 (Charlestown), 173 (Newton); II, 4–5, 128. Cf. Paige, *Hist. of Cambridge*, 1 ff.

[4] *Mass. Col. Rec.*, I, 138, 149, 101, etc.

[5] See *Mass. Col. Rec.*, I, 206, 217, 235, 278. In Plymouth all this business was usually transacted in the court of assistants. Countless examples in *Plym. Rec.*, I.

laws, however, townships were regularly incorporated by special acts assigning their names and defining their boundaries.[1]

At an early day the general court sought also to enforce the proper registration of deeds. Thus, in 1639, the towns of Massachusetts were granted a "respit" until the next court to bring in a transcript of their lands.[2] In 1641 they were ordered to "set out their bounds wthin a twelue month after their bounds are granted."[3] And in 1647 it was ordered that town boundaries should be determined by perambulation once in three years.[4] Similar laws for the preservation of titles and boundaries were also enacted in Plymouth.[5]

The record of the creation of the township of Dedham furnishes an interesting case of special favors granted to a community. It was "ordered that the plantation to be settled above the falls of Charles Ryver, shall have three yeares immunity from publike charges, as Concord had, to bee accounted from the first of May next, & the name of the said plantation is to bee Deddam."[6]

The supervision of public ways was also exercised by the general court; and it seems to have caused a great deal of trouble in the early period. Peremptory orders requiring particular towns "to mend their wayes" were frequent, and fines were often imposed for neglect.[7]

In like spirit general police laws were enacted; such, for example, as those forbidding towns to entertain strangers or to sell them "any lot or habitation," without license;[8] or

[1] *Acts and Resolves*, I, 174, 181, 184, 642, etc.; II, Index at "Towns." So also in Rhode Island: Arnold, I, 337, 364, 368, etc.

[2] *Mass. Col. Rec.*, I, 266.

[3] *Mass. Col. Rec.*, I, 319.

[4] *Mass. Col. Rec.*, II, 210.

[5] *Plym. Col. Rec.*, XI, 52, 63, 182, 187, 188, 216, 259.

[6] *Mass. Col. Rec.*, I, 179. For the case of Concord see *Ib.*, 157, 167.

[7] See examples in *Mass. Col. Rec.*, I, 316, 317, 233, 247, 266–7, etc.; *Plym. Rec.*, XI, 7, 18, 59, 106.

[8] *Mass. Col. Rec.*, I, 196; also 279–80; *Plym. Rec.*, XI, 40–41, 110, 118.

those regulating the watch and the hue and cry,[1] or requiring the towns to provide proper means of defence.[2] Many minor orders relating to towns were passed. Thus fairs were to be held in certain towns;[3] and each was required to have a pound for swine,[4] a trucking-house,[5] and a house for lost goods.[6] Of course in "burning" questions, such as the agrarian controversy between commoners and non-commoners, the heal-all of general legislation was sought. Indeed the regulation of the admission to rights of commonage[7] in the towns, and the management of the common lands[8] were the sources of no little trouble to the legislature.

Aside from these and many other special orders for the regulation of local affairs, in 1635–6 the Massachusetts general court passed something like an organic township act,[9] which, after reciting that "particular townes have many things w^{ch} concerne onely themselves, and the ordering their owne affaires," empowered the major part of the freemen in each to dispose of their lands and appurtenances, grant lots, and make orders concerning any local matter, so long as not repugnant to the enactments of the court, and not involving a penalty of more than 20 shillings for their violation. They were also authorized to choose their own officers, "as constables, surveyors for the highwayes, and the like." But, with the exception of this, during the period of the first charter, the towns were governed by isolated orders touching a great

[1] *Mass. Col. Rec.*, I, 120, 310–11; II, 151; IV, Part I, 419.

[2] *Mass. Col. Rec.*, II, 282; I, 84; *Plym. Col. Rec.*, XI, 51, 105, 181, 180, etc.

[3] *Mass. Col. Rec.*, I, 241.

[4] *Mass. Col. Rec.*, I, 150.

[5] *New Haven Col. Rec.*, I, 43; *Mass. Col. Rec.*, I, 96.

[6] *Mass. Col. Rec.*, I, 281.

[7] See *Mass. Col. Rec.*, I, 65; IV, Part I, 417, for two very interesting orders regulating rights of commonage. Cf. Dr. Adams, *Village Communities*, 63–79, where the whole subject is treated from the sources.

[8] See examples in *Mass. Col. Rec.*, I, 211; II, 39, 49, 105, 180–1, 195, 213; IV, Part II, 563. Cf. Dr. Adams, *Village Communities*, 42 ff.

[9] *Mass. Col. Rec.*, I, 172.

variety of matters. Under the Province laws, however, legislation became much more systematic, entering into the details of functions, powers, and procedure, much in the modern spirit.[1]

The records of Connecticut and Rhode Island show fewer attempts to regulate local affairs. In the latter colony, in particular, the towns have always maintained a high degree of independence; but there is sufficient evidence to show that in both colonies the general court exercised adequate authority.[2]

In the jurisdiction of Plymouth, on the other hand, the connection between the local and central powers appears to have been more intimate than anywhere else in New England.[3] And this may, perhaps, be explained by the fact that the whole body of freemen in this colony possessed the right to participate, when they saw fit, in the deliberations of the general court.

(*b*).—*The Town was the Constitutional Unit.*

But it was in its political or constitutional aspect that the township occupied a unique position. The ancient *tunscipe* was, no doubt, as we are informed by the highest authority,[4]

[1] See *Acts and Resolves*, I, 64–9, for a general township act; and consult the index to titles of the various town officers and functions. Towns were also incorporated by charter: see *Hist. of Chester* in *Coll. New Hampshire Hist. Soc.*, VIII, 345, 349. The early records of the Mass. towns when compared with the Court records show about an equal division of management of local affairs. Ellis, *Puritan Age in Mass.*, p. 250.

[2] In the records of each the acts relating to towns became much more elaborate during the 18th century. In Connecticut the towns were formally "incorporated" in 1639. See Hollister, I, 110; Trumbull, *Hist. Conn.*, I, 114. Arnold, I, 226, for first "charters" to towns (1649) in Rhode Island.

[3] See *Plym. Col. Rec.*, XI, index at "Towns," "Selectmen," etc. A very close supervision over the towns was exercised by the central government in New Hampshire: *New Hampshire Town Papers*, XI, XII.

[4] Stubbs, *Const. Hist.*, I, 82.

the constitutional unit of the Saxon state. But neither the tunscipe nor its successor, the parish, was ordinarily brought into direct contact with the central power. It was overshadowed by the higher organisms of the county and the hundred. Knights of the shire and not town deputies took their seats in the house of commons; and it was the sheriff and not the constable who accounted for the taxes in the exchequer.

In New England, on the other hand, the town was the political atom in a most vital sense. Here the hundred never made its appearance; and when the county was instituted—in some instances many years after the first settlements were planted—the towns were not subordinated to it politically. The shire, as we shall see, discharged administrative functions of no little importance; but it did not become the area of taxation or representation. The town remained as before the constitutional unit in at least three important particulars:

1. It was the fiscal area for the levy of the county as well as the country rate, both of which were assessed, collected, and accounted for by its own officers.

2. It was the unit of the militia organization, each town as a rule being required to maintain a "train-band."[1]

3. Finally and most important it was the area of representation. According to the first charter of Massachusetts the general court was to consist of the governor, assistants, and all the freemen of the jurisdiction sitting as one body.[2] But the attendance of the latter upon the four annual sessions was soon found impracticable. It was therefore ordered in 1634 that each town be empowered "to choose two or three" deputies to represent the body of freemen in all matters save the election of officers.[3] During the early period various

[1] For a discussion of the militia system and the rates see Chap. VII, below.

[2] *Mass. Col. Rec.*, I, 11–12.

[3] *Mass. Col. Rec.*, I, 118.

orders relating to the number of delegates were passed;[1] but it was finally settled that each town should send either one or two representatives at pleasure.[2] By the second charter each town was allowed to send one or two representatives as should be determined by law.[3]

The representative systems of the New Haven, Connecticut, and Rhode Island jurisdictions did not differ essentially from that of Massachusetts.[4] In Plymouth, on the other hand, during the first twenty years we behold the remarkable spectacle of a folkmoot for an entire jurisdiction. Until 1639 every freeman might appear as a legislator in the general court. In that year each town was authorized to choose two deputies, except Plymouth, which should be entitled to four.[5] But throughout the entire history of the colony the freemen, when assembled at the court of election, might, if they saw fit, take the matter of legislation into their own hands.[6]

In one other important branch the town may perhaps be regarded as an administrative unit. The commissioners of small causes, chosen in town-meeting and approved by the

[1] For example in 1636 towns with from 10 to 20 freemen were allowed one; those having from 20 to 40, not above two; and those with 40 and upwards, not more than three deputies. *Mass. Col. Rec.*, I, 178. In 1638/9 no town was to have more than two: *Ib.*, 254.

[2] *Mass. Col. Rec.*, II, 231. But those having thirty freemen or less might send deputies or not as they chose: *Ib.*, IV, Part I, 154.

[3] *Acts and Resolves*, I, 11, 88. But Boston had four: *Ib.*, 88. In the revolutionary period there was a new apportionment: *Ib.*, V, 502.

[4] In New Haven the number of deputies from each town was two: *N. H. Rec.*, II, 4, 36, etc. In Connecticut the number was at first four: Hollister, *Hist. Conn.*, I, 28, 96; by the charter of 1662 the number was not to exceed two: Poore, *Charters*, I, 253. In Rhode Island in the early period each town was represented by a "committee" of six "commissioners:" see lists in Vol. I of *R. I. Col. Rec.*; also Arnold, I, 203, 210, 229. By the royal charter the number was 2, 4, and 6 respectively from different towns: *R. I. Col. Rec.*, II, 8; Arnold, I, 295.

[5] *Plym. Col. Rec.*, XI, 31.

[6] *Plym. Col. Rec.*, XI, 79–80, 92, 169. See also "The Colony of New Plymouth," etc., by William Brigham, in *Lowell Institute Lectures*, 173.

general court or the court of the shire, constituted the lowest judicial tribunal, with appeal to the higher courts.[1] Moreover the assistants, in the towns where they resided, possessed ex officio the ordinary powers of justices of the peace.

Finally in adjusting all these general relations—in framing election laws, determining the qualifications of voters, controlling the currency, and especially in freely exercising the right of general taxation—we have abundant proofs of the sovereign power of the colonial state. There was an equitable distribution of functions between the lower and higher organisms. Indeed the colonial governments were remarkably successful experiments in the development of republican institutions. Never before had there been seen so high a degree of local autonomy co-existing with such adequate sovereign control. It only needed sufficient motive to cause the isolated states themselves to combine in the grander experiment of federal union.

III.—The Town Meeting.

(*a*).—*Membership and Organization.*

The supreme control of the affairs of the community was vested in the town-meeting. In character as well as in name this institution was a reproduction of the ancient tungemot, but with functions far more developed than those of the latter or its representatives, the manorial court leet and the parish vestry. Qualified to share in its deliberations, originally, were all the male inhabitants of legal age. Politically all those who had been regularly admitted as inhabitants of the town were equal;[2] the only restriction upon the right of suffrage being a property qualification for certain offices established at a later day by the general court.[3] But as a rule there was no class

[1] *Mass. Col. Rec.*, I, 239. See Chap. VII, below.

[2] Cf. Eggleston, 36–7.

[3] In 1658 it was provided by the Massachusetts general court that "all Englishmen that are settled inhabitants & house holders in any toune of the

privilege based on rights of commonage.[1] Non-proprietors as well as proprietors, newcomers as well as old, could vote and hold office; and these rights were enjoyed by inhabitants of the town, though not regularly admitted as freemen of the jurisdiction.[2] It is interesting to note in this connection that, from the sixteenth century onward, the principle of political equality, however sharp might remain class distinctions with respect to the use of the common lands, obtained in the village communities of Germany.[3]

Town-meetings were summoned by the constable through "lawful warning from house to house," under authority of the selectmen's warrant;[4] and in the early period they were

age of twenty fower yeares, & of honest & good conuersation, being rated twenty pounds estate in a single countrje rate, that hath taken the oath of fidellitje to this goverment, & no other, except ffreemen, may be jurymen or constables, and have theire vote in the chojce of the selectmen." *Mass. Col. Rec.*, II, 336. A similar act was passed in 1692–3: *Acts and Resolves*, I, 65. Qualified to vote for jurymen were those possessed of real estate worth 40 shillings a year, or personal estate worth 50 pounds: *Ib.*, p. 74. This last was the qualification of electors of members of the Assembly according to the charter: *Ib.*, p. 363. A property qualification for freemen was established in Rhode Island in 1723–4: Arnold, *Hist. of Rhode Island*, II, 77.

[1] The proprietors held meetings of their own for the management of their common fields and kept their own records. See for example, *The Records of the Proprietors of Worcester*, edited by Franklin P. Rice.

[2] See *Mass. Col. Rec.*, II, 197 (1647), repealing an act of 1635, *Ib.*, I, 161. In Rhode Island freemen of the town though not freemen of the jurisdiction could vote even for deputies: Arnold, II, 78. But in Plymouth the right was restricted to freemen with 20 pounds estate: *Plym. Col. Rec.*, XI, 223.

[3] Originally only Commoners—*Genossen*—could appear in the German Mark and Village moots; and this is still the rule in some places. But elsewhere two distinct bodies became differentiated: the *engere* or *herschende Gemeinde*, the proprietors with full right; and the *weitere* or *beherschte Gemeinde*, comprising the various degrees of *Beisassen* or *Nichtmärker*. After the 16th century the wider community absorbed all political powers, leaving sometimes only the administration of the common property to the older and smaller society. But custom varied. See Maurer, *Dorfverf.*, II, 43–4, 77–80, 247–265; I, 162 ff.; *Markenverf.*, 323; *Einleitung*, 144 ff.; Thudichum, *Gau- und Markverf.*, 229–230; Laveleye, *Prim. Prop.*, 71 f., 89.

[4] The warrant might be issued by the town clerk on order of the selectmen, or by the "next" justice of the peace within the county in case of

held with a frequency which must have been a serious encroachment upon the ordinary business of the community,[1] especially since fines for absence were usually imposed.[2]

When the people were duly assembled they proceeded at once to "organize." This procedure consisted simply in the choice of a moderator, the town-clerk acting ex officio as secretary of the meeting. No one could speak without the moderator's permission and he could impose fines for disorderly conduct or command refractory persons to withdraw.[3]

(*b*).—*Powers and Functions: Extracts from the Records.*

When organized the meeting could pass orders and enact by-laws touching every detail of the "prudential" affairs. First in importance was the right to levy taxes. The order

neglect or refusal of the selectmen to act; and by the justices in the first instance when the meeting was called for choice of jurors: *Acts and Resolves*, I, 68, 74. The warrants were sometimes read in the meeting before deliberation began. See examples in *Braintree Records*; also in *Worcester Records*, 1740–53, p. 88. A law of Massachusetts, Dec. 22, 1715/16, allowed ten or more freeholders to signify to the selectmen any matter which they wished considered and it must be inserted in the warrant; and no subject could be discussed not contained in the warrant: *Acts and Resolves*, II, 30. A similar order was adopted in 1701 by the Boston town-meeting: *Town Records*, 17. For example of selectmen's warrant see *New Hampshire Town Papers*, XI, 515.

[1] For example ten general town-meetings were held in Boston in 1635: *Records*, 1634–60, pp. 4–8. See also Paige, *Hist. of Cambridge*, 17 ff.

[2] On fines for absence see *New Haven Col. Rec.*, II, 172; *Newark Town Rec.*, 81; *Dorchester Town Rec.*, 8, 10, 292; Freeman, *Hist. Cape Cod*, II, 358 (Eastham).

[3] *Acts and Resolves*, II, 30. As a rule the moderator was chosen for the particular meeting. In Boston, however, in the early period, he seems to have been often elected as an annual officer: *Boston Town Records*, 1660–1700, at various general meetings. But in 1701 a by-law was enacted requiring the moderator to be chosen for every meeting and defining his powers: *Town Records*, p. 17. Sometimes the same person was regularly chosen moderator at every meeting for a long term of years: so John Chandler, Esq., at Worcester: *Worcester Records*, 1740–1753.

directing the levy took the form of a command to the selectmen or other raters to "make a rate" for a specified purpose, such as for the minister's salary, or the support of the schools. Sometimes the exact amount required was named in the order,[1] or that might be left for the raters to determine.[2] The various objects for which local taxes were needed may be best understood from a typical example, which, however, will be relegated to the margin.[3]

[1] See examples in *Dorchester Town Records*, 35, 57, etc., and *Worcester Town Records*, 1753–83, p. 14, etc.

[2] Examples of this method in *Boston Town Records*, 1634–60, p. 65, etc.

[3] "9: 9m. 1657. An account of the Rate of 40^{li}: 9^{s}: 11^{d}: made in yeare 1655: for discharge of severall Expences and Charges for the Townes vse and Scoole cometted vnto the hands of Henry Garnsey Bailife:

	li.	s.	d.
Item to William Pound for mending the Stockes	00.	09.	06
I^{t} for Selectmens Diett in the yeare 56: to Goode George 3^{li} 2^{s} 10. whereof shee receved 22^{s} of Edmon Blake which he owed the towne for the Scoole house and som of Thomas Burd so we Laid out	01.	12.	11
Item Left Clap as Debute for the yeare 56	01.	16.	06
Item to Deacon Weswall as Debute and other p'ticulers as by bill	02.	16.	06
Item to Nathaniel Patten in severall p'ticulers as by bill of which	00.	10.	06
my rate is 9^{s} 4^{d} so remaynes to me 14^{d}.			
I^{t} to Goodman Andrus for worke about meting howse . . .	00.	08.	00
Item to Edmon Browne for worke about meting howse . .	00.	05.	06
I^{t} to Richard Evens for worke about the Scoole howse . .	00.	10.	06
I^{t} to M^{r} Glouer for running the Lyne and Charge about Bastian Keans wife in her sickness	00.	06.	6
I^{t} to William Somner for Runing the Lyne	00.	05.	
I^{t} to Mahalaell Munnings for Runing the Lyne	00.	05.	0
I^{t} to Robert Voce and his two sonns for runing the Lyne .	00.	07.	6
I^{t} to Robert Badcoke for Runing the Lyne	00.	02.	6
I^{t} to Thomas Hollman for Running the Lyne	09.	01.	0
I^{t} to Robert Redman for killing a woolfe	01.	00.	0
I^{t} to William Trescot for killing a woolfe	01.	00.	0
I^{t} to James Minott for his man Pike to keepe hoggs . . .	00.	02.	6
I^{t} to Robert Pearce for mending a gate in the greet Lots . .	00.	01.	0

In the meeting also were chosen the town officers and the deputies to the general court;[1] and, during the early period in particular, a vast number of orders and by-laws were passed relating to the use of the common fields and pastures; directing the management of the village herds; authorizing the laying out of ways and the running of boundary lines; making assignment of lands to individuals; and regulating the construction of fences. Especially interesting are those portions of the early records containing provisions for the support of education and the church; for the township was not merely a political organism; it was also a school district and a body of co-worshippers. Many entries such as the following may be found in the records:—

"The 4th of the (10th) 66. At a towne meting after some agetations about a Schoolmaster It was put to the Vote whether ther should be a Schole Master enquiered after, and p'curered for to teach Schole in this towne, It was voted in the Afermatiue, and by a Second vote it was agreed vnto that Master Mather and Lift^nt^ Hopestill Foster and John Minot should be desier[ed] and empowered to endeauor to p'cuer a Schol-Master.

"The same day it was voted and granted that M^r^ pole should be spoken vnto to goe on in keepeing Schole vntill another Master be p'cuered, at the same rate as formerly,

Item allowed Henry Gearnsey for Lose of Corne for want of Convenient roome and having no order to dispose of it . .	00.	09.	0
I^t^ wee allow him the said Henry for his paines att Necke .	00.	12.	0
I^t^ paid the Scoolemaster Icabud Wiswall by the Baylife . .	20.	19.	11
I^t^ the Baylife craue allowance for John Smith John Plume Thomas Garnett Samuell Hollway Retorne Munning and Bastian Keane, som of them gonn, other poore, and M^r^ Edward Tinnge tresuer the whole is	00.	04.	10
I^t^ for Selectmens Diett for: 1657:	03.	00.	0
Sum is	li37	6.s	8d

Dorchester Town Records, 81–82.

[1] The annual meeting for the election of town officers was held in March. *Acts and Resolves*, I, 65.

p'portionably according to the time he shall soe doe, and William Sumner is appointed to speake to M^r^ pole about it, if he will accept of it soe to doe."[1]

These homely minutes acquire a deep significance when we consider that it was by such orders of the town-meeting that the foundations of our present free school system were laid. For a great epoch in the history of social progress is reached when our New England ancestors recognized the support of popular education as a proper function of local government. The introduction of the school rate as a legitimate item of public taxation deserves a memorable place in American annals; and the event is all the more remarkable, because it anticipated the development of thought in the mother country by nearly two centuries and a half.[2]

In 1647 the general court of Massachusetts required every town of fifty families to establish elementary schools, to be supported either by the masters or parents of the children attending, or by the inhabitants in general, as the selectmen should determine. In like manner grammar schools were to be maintained in towns of one hundred families.[3] But, before

[1] *Dorchester Town Records*, 136–7.

[2] In 1807 Mr. Whitbread brought a bill before Parliament for the establishment of parochial schools, to be supported by local taxation, but it was defeated, mainly on religious grounds: Craik, *The State and Education*, 10. Elective school boards with the power to levy local rates were first created by act of Parliament in 1870: *Ib.*, 88 ff.

[3] However the primary motive of the act is to promote religious knowledge: "It being one cheife p'iect of y^t^ ould deluder, Satan, to keepe men from the knowledge of y^e^ Scriptures, as in form^r^ times by keeping y^m^ in an unknowne tongue, so in these latt^r^ times by p'swading from y^e^ use of tongues, y^t^ so at least y^e^ true sence & meaning of y^e^ originall might be clouded by false glosses of saint seeming deceivers, y^t^ learning may not be buried in y^e^ grave of o^r^ fath^rs^ in y^e^ church & comonwealth, the Lord assisting o^r^ endeavo^rs^," etc.: *Mass. Col. Rec.*, II, 203. Cf. *Plym. Col. Rec.*, XI, 142 (1658). It is important to note that the practical unity of the people of Massachusetts in matters of faith, rendered the establishment of public schools a comparatively easy matter. It was only gradually that those schools became secular, as thought became more liberal. On the other hand, in England,

the intervention of the colonial authority, the individual communities had already made provision for elementary education. The following somewhat elaborate ordinance, adopted by the Dorchester town-meeting in 1644, is not without historical value on account of the glimpse which it affords of the peculiar moral and religious conceptions of the age; and it also illustrates the "exhaustiveness" of many of the early town enactments, although, in this instance, the authors are painfully conscious that it is "difficult if not impossible to give p'ticular rules that shall reach all cases which may fall out." But as an example of the earliest local legislation on the subject of school government, it is of supreme interest. Here we have all the essential features of the district organization as we know it at the present hour. In the board of wardens, the township has shown its capacity to differentiate a new local authority for the administration of a new and important function:

"Upon a generall and lawfull warning of all the Inhabitants the 14th of the 1st moneth 1645 these rules and orders following p^{r}sented to the Towne concerning the schoole of Dorchester are confirmed by the maior p'te of the Inhabitants then p^{r}sent.

"First It is ordered that three able, and sufficient men of the Plantation shalbe chosen to bee wardens or oūseers of the Schoole aboue mentioned who shall haue the Charge oūsight and ordering thereof and of all things Concerneing the same in such manner as is hereafter expressed and shall Continue in their office and place for Terme of their liues respectiuely, vnlesse by reason of any of them Remouing his habitation out of the Towne, or for any other weightie reason the Inhabitants shall see cause to Elect or Chuse others in their roome in which cases and vpon the death of any of sayd wardens the Inhabitants shall make a new Election and choice of others.

sectarian strife and the dread of secularizing education, prevented the adoption of a similar system until 1870. See the interesting book of Mr. Craik already cited.

"And M^r^ Haward, Deacon Wiswall, M^r^ Atherton are elected to be the first wardens or oūseers.

"Secondly, the said Wardens shall haue full power to dispose of the Schoole stock whither the same bee in land or otherwyse, both such as is already in beeing and such as may by any good meanes heereafter be added: and shall Collect and Receiue the Rents, Issues and p'fitts arising and growing of and from the sayd stock. And the sayd rents Issues and p'fits shall imploy and lay out only for the best behoof, and advantadge of the sayd Schoole; and the furtherance of learning thereby, and shall giue a faythfull and true accoumpt of there receipts and disbursements so often as they shalbee thervnto required by the Inhabitants or the maior p'te of them.

"Thirdly the sayd Wardens shall take care, and doe there vtmost and best endeavor that the sayd Schoole may frō tyme to tyme bee supplied with an able and sufficient Schoolemaster who neūthelesse is not to be admitted into the place of Schoolem^r^ without the Generall cōsent of the Inhabitants or the maior p'te of them.

"Fowerthly so often as the sayd Schoole shalbee supplied with a Schoolem^r^—so p'vided and admitted, as aforesayd the wardens shall frō tyme to tyme pay or cause to be payd vnto the sayd Schoolem^r^ such wages out of the Rents, Issues and p'fitts of the Schoole stocke as shall of right Come due to be payd. . . .

"Sixthly the sayd Wardens shall take care that eūy yeere at or before the end of the 9^th^ moneth their bee brought to the Schoolehowse 12 sufficient cart, or wayne loads of wood for fewell, to be for the vse of the Schoole master and the Schollers in winter the Cost and Chargs of which sayd wood to bee borne by the Schollers for the tyme beeing who shalbe taxed for the purpose at the discretion of the sayd Wardens.

"Lastly the sayd Wardens shall take care that the Schoolem^r^ for the tyme beeing doe faythfully p'forme his dutye in his place, as schoolm^rs^ ought to doe as well in other things as in these which are hereafter expressed, viz.

"First that the Schoolem^{r} shall diligently attend his Schoole and doe his vtmost indeavor for Benefitting his schollers according to his best discretion without vnnecessaryly absenting himself to the p^{r}iudice of his schollers, and hindering there learning.

"2^{ly} that from the begiñing of the first moneth vntill the end of the 7th he shall eũy day begin to teach at seaven of the Clock in the morning and dismisse his schollers at fyue in the afternoone. And for the other fiue moneths that is from the beginning of the 8th moneth vntill the end of the 12th mõth he shall eũy day beginn at 8th of the Clock in the morning and [end] at 4 in the afternoone.

"3^{ly} eũy day in the yeere the vsuall tyme of dismissing at noone shalbe at 11 and to beginn agayne at one except that

"4^{ly} eũery second day in the weeke he shall call his schollers togeither betweene 12 and one of the Clock to examin them what they haue learned on the saboath day p^{r}ceding at which tyme also he shall take notice of any misdemeanor or disorder that any of his skollers shall haue Committed on the saboath to the end that at somme convenient tyme due Admonition, and Correction may bee admistred by him according as the nature, and qualitie of the offence shall require at which sayd examination any of the elders or other Inhabitants that please may bee p^{r}sent to behold his religious care herein and to giue there Countenance, and ap'pbation of the same.

"5^{ly} hee shall equally and impartially receiue and instruct such as shalbe sent and Comitted to him for that end whither their parents bee poore or rich not refusing any who haue Right and Interest in the Schoole.

"6^{ly} such as shalbe Cõmitted to him he shall diligently instruct as they shalbe able to learne both in humane learning, and good litterature, and likewyse in poynt of good manners, and dutifull behauior towards all specially their sup'iors as they shall haue occasion to bee in their p^{r}sence whether by meeting them in the streete or otherwyse.

"7^{ly} eũy 6 day of the weeke at 2 of the Clock in the after-

noone hee shall Chatechise his schollers in the principles of Christian religion, either in some Chatechism which the Wardens shall p'vide, and p^r^esent or in defect thereof in some other.

"8^ly^ And because all mans indeavors without the blessing of God must needs bee fruitlesse and vnsuccessfull theirfore It is to be a cheif p'te of the schoolem^rs^ religious care to Comend his schollers and his labours amongst them vnto God by prayer, morning and euening, taking care that his schollers doe reuēndly attend during the same.

"9^ly^ And because the Rodd of Correction is an ordinance of God necessary sometymes to bee dispenced vnto Children but such as may easily be abused by oūmuch seūitie and rigour on the one hand, or by oūmuch indulgence and lenitye on the other It is therefore ordered and agreed that the schoolemaster for the tyme beeing shall haue full power to minister Correction to all or any of his schollers without respect of p'sons according as the nature and qualitie of the offence shall require whereto, all his schollers must bee duely subiect and no parent or other of the Inhabitants shall hinder or goe about to hinder the master therein. Neūthelesse if any parent or others shall think their is iust cause of Complaynt agaynst the master for to much seūitye, such shall haue liberty freindly and louingly to expostulate with the master about the same, and if they shall not attayne to satisfaction the matter is then to bee referred to the wardens who shall imp'tially Judge betwixt the master and such Complaynants. And if it shall appeare to them that any parent shall make causlesse Complaynts agaynst the m^r^ in this behalf and shall p'sist and Continue so doeing, in such case the Wardens shall haue power to discharge the m^r^ of the care, and Charge of the Children of such parents. But if the thing Complayned of bee true and that the m^r^ haue indeed bene guiltie of ministring excessiue Correction, and shall appeare to them to Continue therein, notwithstanding that they haue advised him otherwise, in such case as also in the case of to much lenitye; or any

other great neglect of dutye in his place, p'sisted in It shalbe in the power of the Wardens to call the Inhabitants together to Consider whither it were not meet to discharge the m^{r} of his place that so somme other more desirable may be p'vided

"And because it is difficult if not Impossible to give p^{r}ticular rules that shall reach all cases which may fall out," therefore the wardens may "dispose of all things that concerne the schoole, in such sort as . . . they shall Judge most Conducible for the glory of God, and the trayning vp of the Children of the Towne in religion, learning and Civilitie."[1]

Expedients like the following for contributing to the support of the minister were often adopted:

"Its ordered that eury Inhabitant of o^{r} towne shall Attend to Cutt & Cary o^{r} past^{rs} wood for this yeere wth w^{t} hands & Cattle they haue, & in default to pay three shillings p' hand & ten shillings for six oxen & eight shillings for fowre & fowre shillings for two oxen, & the time of meeting for ax men is to be by the sun halfe an houre high, & for Carters by Sun̄ one houre high; and in Cass any p'son shall be Defectiue," he shall forfeit a certain sum for each hour's absence for man and team, which shall be added to the minister's rate: and "John Batchelder & John Abbey Juny^{r} is Chosen Siruey^{rs} to see to the fulfilling of this order & they haue full power to Judg of the Defects of the time acording to their Discreton & to make a Returne to the Raters, & its agreed that the first two faire dayes of the next weeke shall be the time for the worke doeing & whosoeuer doe not attend the first daye shall haue liberty till the 2d daye, & the place of meeting to be at o^{r} past^{rs} house."[2]

Nothing connected with the civil or religious life of the community seems to have been too minute to escape the attention of the town-meeting. Here is another example:—

[1] *Dorchester Town Records*, 54–6. See *Ib.*, 151.

[2] *Wenham Town Records* (1671), in *Collections of Essex Institute*, Vol. XX, 145. The punctuation has been slightly altered.

"On the Sixth artikle voted that the Two Hind Body of mens Seats on the Lower floore in the meeting house be assigned for Seats to those Persons who shall Sett together and lead in singing in the Congregation on Lords Days."[1]

"Voted that the mens seats in y^e^ Body of y^e^ meeting house be Inlarged to y^e^ womens Seats, and that y^e^ Space between Judge Jenisons heirs & Lieut Stearns pew be devided and added to their pews they Consenting, & that y^e^ doors to these pews be made to Come out into the hind alley and that a man & a woman be placed in each of these pews, by y^e^ Comitte for seating y^e^ meeting house."[2]

The abrupt passage from the trivial to the sublime, illustrated by the following consecutive orders, is interesting and characteristic: —

"on y^e^ Eleventh article y^e^ Question was Put whither y^e^ Town would Give order that any part of y^e^ Womens Gallery should be appropriated for y^e^ men to sit in and it Passed In y^e^ Negative

"on y^e^ twelfth article y^e^ Petition of Othniel Taylor and forty others was Read & y^e^ Question Put whither y^e^ Pamphlett Drawn up by y^e^ Town of Boston Containing y^e^ Greivances this Province Labour under Should be Read, and after Some Debate thereon it Passed In y^e^ affirmative."[3]

The foregoing extracts from the archives of New England towns must suffice as illustrations, though the temptation to multiply them is very great. No adequate conception of the wealth of historical material contained in these records can be formed from mere quotation. Fortunately many of them are now in print and within easy reach of all. They constitute an inexhaustible mine in which the student of American institutions will find his labor abundantly rewarded and constantly enlivened by the most delightful surprises.

[1] *Worcester Town Records*, 1753–1783, p. 206.
[2] *Worcester Town Records*, 1740–1753, p. 98. Cf. *Ib.*, 100.
[3] *Worcester Town Records*, 1773, p. 201.

In our national history the town-meeting fills a glorious page. In fostering the growth of a sentiment of union among the colonists, it played a part so important politically as almost to justify the claim of those who regard it as an American product. It was a genuine folcgemot, but a folcgemot far more developed and independent politically than that of the old English tun. It was here that the idea of nationality, of colonial unity, germinated and was fostered into a sublime reality. Under the leadership of Sam Adams the town-meeting of Boston, followed and sustained by the village moots of New England and the vestries of Virginia, was the head and front of the opposition to England and the source of all political organization. The celebrated "instructions" of this assembly in 1764 led to the Congress of 1765. Here also originated in 1772 the first of those "Committees of Correspondence" which gave birth to the first national party, and, practically, at a single stroke, achieved national independence.

If it is difficult to see, without the township, how the Englishman could have triumphed over the Frenchman in the struggle for the control of the continent;[1] it is no less difficult to understand how, without it, the English race in America could have grown into an independent nation.[2]

IV.—The Selectmen.

(*a*).—*Evolution of the Office.*

Next in importance and authority to the town-meeting, and constituting the characteristic feature of New England town government, was the board of townsmen or selectmen.[3] These

[1] See Scott, *Development of Constitutional Liberty*, 48–53.

[2] On the Boston town meeting and Sam Adams see Frothingham, *Rise of the Republic of the United States*, Chaps. V, VII; Hosmer, *Sam Adams*, 37. Cf. Scott, *Development of Constitutional Liberty*, 174–184.

[3] In the records also variously styled "selected townsmen," the "five," "seven," "nine," or "thirteen" men, or "y^e^ chosen men for managing the prudential affairs."

were a committee, from three to thirteen[1] in number, annually chosen by the inhabitants to order their prudential affairs. In this body the town found its chief expedient for representative government; the selectmen being in fact the "town representative"—a name which, in one instance at least, they actually bore.[2]

This institution may have been suggested by the select vestry of the Stuart reigns or by the committee[3] from which the latter was evolved; but the select vestry was a close corporation which had gradually usurped the functions of the open parish meeting. On the other hand the selectmen were a responsible board, acting under the "instructions" of the town-meeting and accountable to that body for their acts. Any business might be assigned them to transact; or a function at one time delegated to them could at another, in the discretion of the town-meeting, be entrusted to the assessor, collector, constable, or some other officer.[4]

Selectmen are mentioned in the very earliest extant proceedings of the Massachusetts towns. For example, two of the first entries in the Boston records, as now published by the Record Commission, consist of minutes of "the 10 to manage

[1] For example, in Boston I find the number to be, at different times, 10, 7, or 9, with several oscillations among these figures: *Boston Records*, 1634–60, pp. 2, 65, 99; 1660–1701, pp. 165, etc. In the Plymouth jurisdiction the number was 3 or 5: *Plym. Col. Rec.*, XI, 143; in Worcester, 5: *Worcester Records*, 1740–1783, at various annual meetings; in Braintree, 5, 7, and 3: *Braintree Records*, 29, 476, 519, 496, 613, etc.; in Salem, 13, 12, and 7: *Salem Records*, 15, 50, 58, 170, 196; in Wenham, 3: *Wenham Records*, 80, 140; in Groton, 5 and 7: *Groton Records*, 1662–78, pp. 16, 40, 42, 45; in Newark, 7: *Newark Records*, 54; in Dorchester, 12, 7, 10, and 5: *Dorchester Records*, 16, 38, 35, 228; by the *Province Laws* of New Hampshire the number of selectmen was not to exceed seven: see *Coll. of New Hampshire Hist. Soc.*, VIII, 30.

[2] See the early entries in the *Town Records of Salem*, pp. 4, 15, 16, 17, 18, 27, 33, etc.

[3] On this obscure question see Channing, *Town and County Government, Studies*, II, 450–52; also above.

[4] Any of the town records will furnish illustrations.

the affaires of the towne."[1] But the name does not appear in the Colonial records until some years after the first settlement. In 1642 the general court empowers "y^e^ chosen men appointed for managing the prudentiall affajres" of every town to superintend the education of children, in cases of neglect by parents;[2] and in the same year, the "selected townes men" are authorized to lay out "p^r^ticuler & private wayes."[3]

In New Haven "townsmen" were first chosen in 1651, in order that the town-meetings "which spend the towne much time, may not bee so often." Here the principle of district representation was adopted, one townsman being chosen out of each "quarter" of the town.[4]

In the Connecticut jurisdiction three, five, or seven of the "cheefe inhabitants" of each town were authorized in 1639 to try small causes, register wills, and administer estates. Each town was ordered in 1643 to "choose annually seven men who should give the common lands their 'serious and sadde consideration.' Seven years later this work was given to the townsmen and formed the basis of the power of Connecticut selectmen. So the genesis of the office in Connecticut was almost totally different from that of the similarly named office in New Haven."[5]

In Newark, New Jersey, settled in 1666 by men of the original New Haven jurisdiction, "Towns Men" were first created in 1673–4 "to carry on such work for the Good of the Town as the Town shall think fit to betrust them with."[6]

From an early period in Rhode Island the functions of the selectmen seem to have been performed by the "town council." In 1647 it was ordered by the general court for the Provi-

[1] *Boston Town Records*, 1634–60, p. 2. See also *Salem Records*, p. 15 and *Dorchester Records*, p. 16, for early examples.

[2] *Mass. Col. Rec.*, II, 6, 9.

[3] *Mass. Col. Rec.*, II, 4.

[4] See Levermore, *Republic of New Haven*, 71–2.

[5] Quoted from Levermore's *Republic of New Haven*, 72 note.

[6] *Newark Town Records*, 54.

dence Plantation that councils consisting of six men should be chosen by the towns at their next meetings.[1] In 1664 the first general assembly under the new charter passed the curious order that each town should elect "Towne Counsell men, soe many as to make up sixe with the Assistants of each towne."[2] This provision was not satisfactory, especially for the town of Providence where three of the six councilmen were assistants. It was therefore ordered in 1681 that Providence should elect six members of the council to serve with the assistants.[3] The town council seems to have absorbed the powers of the old "head officer" of the town, which office soon became extinct.[4]

Selectmen were first instituted in the Plymouth jurisdiction by an order of the general court in 1663.[5] It was enacted that in every town three or five "Celect men" should be chosen subject to the approval of the court "for the better managing of the affaires of the respective Townships." These were empowered to try actions for debts not to exceed forty shillings, and to issue summons in his majesty's name.

It is important to observe the close connection established in Plymouth between the selectmen and the central authority of the jurisdiction. They were in fact the chief intermediary between the court and the local organizations. They were bound by a stringent oath;[6] liable to a fine of twenty shillings for refusing to serve, the governor being authorized in such case to fill the vacancy by appointment;[7] and it was "ordered

[1] *Rhode Island Col. Rec.*, I, 151.

[2] *Rhode Island Col. Rec.*, II, 27.

[3] *Rhode Island Col. Rec.*, III, 104–5. Cf. Arnold, I, 466, 204.

[4] *Rhode Island Col. Rec.*, II, 1674, p. 526. Cf. Arnold, I, 369.

[5] *Plymouth Col. Rec.*, XI, 143. For the date see Freeman, *Hist. of Cape Cod*, I, 250, II, 362.

[6] "The oath of a Celect man. You shall according to the measure of wisdome and discretion God hath giuen you faithfully and Impartially try all such cases between p'ty and p'ty brought before you; as alsoe giue sumons respecting youer trust according to order of the Court as a Celect man of the Towne of —— for this p'sent yeare soe healp" etc. See *Plymouth Col. Rec.*, XI, 217.

[7] *Plym. Col. Rec.*, XI, 227.

by the Court . . . that the choise of Celect men be specifyed in the warrants that are sent downe to the seuerall Townes for the choise of his ma^ties^ officers; and theire names to be returned vnto the Court vnder the Constables hand and to be called in Court to take theire oath as in such case prouided."[1] The character of the selectmen as local agents of the crown and of the colonial government was also clearly recognized in Massachusetts, where, particularly in the eighteenth century, a multitude of administrative duties were imposed upon them by statute. In Connecticut likewise, as already shown, the office had its beginning in magisterial functions imposed by the general court; but nowhere else were their obligations as king's officers so sharply emphasized as in the jurisdiction of Plymouth.

(*b*).—*Functions of the Selectmen.*

As the town representative a vast number of functions devolved upon the selectmen. Nearly every kind of business that could be transacted by the town-meeting itself, save only the election of the more important officers, was constantly performed by them. Their proceedings were recorded by the town clerk, usually in the same book and interspersed with those of the town-meeting.[2] Indeed the minutes of the former are scarcely to be distinguished in character or form from those of the latter body.[3]

[1] *Plym. Col. Rec.*, XI, 252.

[2] So, for example, in the records of Wenham, Groton, Salem, and Dorchester; also in those of Boston until 1701, after which date they were kept separately. See the five volumes of selectmen's records already published by the Record Commission.

[3] In the *Salem Town Records*, for example, it is not always easy to say whether the minutes of so-called town-meetings are not really those of the selectmen—the introductory list of names of those present often being those of selectmen only.

Very frequently, of course, the meetings are introduced by the phrase: "at a meeting of the selectmen;" but sometimes the minutes are headed: "A towne meeting of the 12 men appoynted for the business thereof whose

The following is a list, by no means exhaustive, of selectmen's duties gathered from the original records:

The town-meeting was summoned on their warrant, and they were required by law to regulate meetings called for choice of representatives, notify the latter of their election, and make return to the sheriff.[1] They could enact by-laws when so directed by the town-meeting.[2]

The entire financial administration was vested in them. Thus they could make or assess the rates of the town, county, or country, general or special;[3] authorize the constable to collect them;[4] audit his account of disbursements, as also those of the town treasurer; and act as a board for equalization of taxes.[5]

The selectmen were the legal representatives of the town as a corporate body. Hence it was their duty to order suits to be instituted for the recovery of debts or fines;[6] to let contracts for public works; and lease or convey the town's property when occasion demanded.[7]

To them were also entrusted the important functions of

names are here vnder written:" *Records of Salem*, 50, 128; of Dorchester, 16; or they are introduced merely by a list of names, thus: "At a meeting this day of Thomas Oliver, Thomas Leveritt, Robert Keayne etc. it was granted," etc.: *Boston Records*, 1634–60, p. 35, etc.; or: "July 5th 1636. Mr. Ludlow, Mr. Stoughton, Mr. Hull etc. It is ordered," etc.: *Records of Dorchester*, 17.

[1] *Acts and Resolves*, I, 65, 89, 147, etc., II, 30; see *Rec. of Boston Select.*, 1701–15, pp. 8, 303, etc.

[2] *Acts and Resolves*, I, 66. See almost any page of the town records.

[3] See *Acts and Resolves*, I, Index at "Taxes." For illustrations see *Boston Town Records*, 1634–60, pp. 88, etc.; 1660–1701, pp. 3, 6, 12, 178, etc; *Dorchester Records*, 72, 81, 178, etc.

[4] See examples in *Boston Rec.*, 1634–60, pp. 133, 140; 1660–1701, pp. 158, 189, etc. *Dorchester Rec.*, 115, 116, etc.

[5] *Boston Rec.*, 1634–60, pp. 10, 12, 127, 132; 1660–1701, p. 153; *Rec. of Bost. Select.*, 1701–15, pp. 3, 10, 15, 17, 33, 34, etc.

[6] Examples in *Bost. Rec.*, 1634–60, pp. 71, 84, 122, 124, etc.; *Rec. Bost. Select.*, 1701–15, pp. 207, 217.

[7] *Bost. Rec.*, 1634–60, pp. 91, 92, 93, 96, 101, 102, etc.; 1660–1701, pp. 177, 179–80, etc.; *Rec. Bost. Select.*, 1701–15, pp. 11, 23, etc.

admitting newcomers as inhabitants of the town;[1] regulating the temporary entertainment of strangers and establishing fines for violation of orders;[2] authorizing the sale of real estate by individuals and fixing penalties for alienation to strangers without leave.[3]

They had charge likewise of the common lands: making allotments to individuals;[4] granting permission to mow the "marshes";[5] regulating the number and kind of animals to be driven upon the common pastures and fixing the fees of the drivers;[6] and apportioning the use of wood and timber. The orders relating to the running at large of swine alone fill a great space in the records.[7]

By the selectmen, in like manner, private ways were laid out;[8] boundary lines were established and controversies relating thereto determined. The description of the boundaries of estates was made a part of their records;[9] and they also passed orders defining the kind and height of fences and fixing penalties for violation of the same.[10]

In Boston a great variety of executive duties devolved upon the selectmen, some of which, of course, were not required in the smaller communities. We find them, for example, licensing ordinaries or "victualling houses";[11] ordering the erection

[1] See *Bost. Rec.*, 1634–60, pp. 36, 43, 65, etc.; *Dorchester Rec.*, 124–5, 131–2, 137, etc.

[2] *Bost. Rec.*, 1634–60, pp. 10, 90, 113, 120–1, 152, etc.

[3] *Bost. Rec.*, 1634–60, pp. 12, 19, 35.

[4] *Mass. Col. Rec.*, II, 49. Countless examples in all the early town records.

[5] See examples in *Bost. Rec.*, 1634–60, pp. 78, 100, etc.; *Salem Rec.*, 44, 45, 70, 71, etc.;

[6] For examples see *Bost. Rec.*, 1634–60, pp. 9, 10, 40, 68, etc.

[7] Examples in *Salem Rec.*, 68, 87, 92, 211, 225, etc.

[8] *Acts and Resolves*, I, 137; *Bost. Rec.*, 1634–60, pp. 10, 13, 73, etc.

[9] *Bost. Rec.*, 1634–60, pp. 46, 57, etc.: 1660–1701, pp. 169, 8, 25, 178, 234, 150–52, 209–10.

[10] Examples in *Bost. Rec.*, 1634–60, pp. 9, 13, 33, 39, etc. See also *Mass. Col. Rec.*, IV, Part I, 153.

[11] *Bost. Rec.*, 1634–60, pp. 10, 107, 112, etc.; 1660–1701, pp. 206, etc.

of buildings and "yard payles";[1] authorizing the construction of "salt peter" houses and limekilns;[2] directing the building and repair of bridges and wharves;[3] superintending the paving of streets[4] and the making of sewers;[5] abating nuisances;[6] removing obstructions from ways and landings, and appointing overseers of landing places;[7] establishing ferries;[8] enacting fire ordinances requiring ladders and engines to be provided and regulating the construction and inspection of chimneys;[9] licensing brewers and fixing the price of beer;[10] approving persons applying to the county court for license to still strong waters and retail the same;[11] admitting apprentices "to follow their calling";[12] directing the constable's watch;[13] employing teachers and prescribing regulations for the public schools;[14] controlling almshouses;[15] letting the public printing;[16] quarrantining vessels;[17] providing dinners

[1] *Bost. Rec.*, 1634–60, pp. 12, 14, 16, 70, etc.; 1660–1701, p. 171.

[2] *Bost. Rec.*, 1634–60, pp. 56, 70.

[3] *Bost. Rec.*, 1634–60, pp. 1, 2, 56, 121, etc.

[4] *Bost. Rec.*, 1634–60, p. 113; *Rec. Bost. Select.*, 1701–15, p. 33; 1742–53, pp. 54–5.

[5] *Bost. Rec.*, 1660–1701, pp. 179–81. Cf. *Acts and Resolves*, I, 643.

[6] *Bost. Rec.*, 1634–60, p. 91.

[7] *Bost. Rec.*, 1634–60, pp. 1, 2, 121, etc.

[8] *Bost. Rec.*, 1634–60, p. 89.

[9] *Bost. Rec.*, 1634–60, pp. 106, 114, 116–17, 150, etc.; 1660–1701, p. 162; *Rec. Bost. Select.*, 1701–15, p. 20. Some of these passages show that fire ordinances were also enacted in town-meeting.

[10] *Bost. Rec.*, 1634–60, pp. 90, 91; 1660–1701, p. 21.

[11] *Bost. Rec.*, 1660–1701, pp. 15, 156, etc.; *Rec. Bost. Select.*, 1701–15, pp. 24, 27, 211. This was enjoined by law. See *Acts and Resolves*, I, 37, 56, 664, 680, etc.

[12] *Bost. Rec.*, 1634–60, p. 137.

[13] *Bost. Rec.*, 1660–1701, pp. 2, 8, 9, 10, 16, 21; *Rec. Bost. Select.*, 1701–15, p. 5. The maintenance of the watch was regulated by statute. See *Mass. Col. Rec.*, IV, Part I, 293; *Acts and Resolves*, I, 381, 699.

[14] *Bost. Rec.*, 1660–1701, pp. 161, 234; *Rec. Bost. Select.*, 1642–53, p. 28. Authorized also by law: *Acts and Resolves*, I, 63, 681.

[15] *Bost. Rec.*, 1660–1701, p. 186.

[16] *Rec. Bost. Select.*, 1742–53, pp. 54, 82, 97, 104, etc.

[17] *Rec. Bost. Select.*, 1742–53, pp. 105, 38–40, etc.

for school visitors and town officers;[1] defining the duties of sexton; and registering the "middle price" of wheat under the "assize of bread."[2]

Still other duties were imposed upon the selectmen by statute. In the Plymouth jurisdiction, as we have seen, they could try actions for debt and issue summons.[3] They were authorized to decide disputes between English and Indians;[4] and they were granted a censorship of private morals. It was ordered, for example, that, "wheras great Inconvenience hath arisen by single p'sons in this Collonie being for themselues and not betakeing themselues to liue in well Gou'ned famillies . . . henceforth noe single p'son be sufferred to liue of himselfe or in any family but such as the Celectmen of the Towne shall approue of;" and similar and more extended powers of this character were conferred upon them in the Bay Colony.[5]

By the Massachusetts statutes they were constituted overseers of the poor in places where no one was "particularly chosen to that office;"[6] were required to set idle and disorderly persons to work; to bind out poor children as apprentices;[7] provide a town stock of arms and ammunition and levy a tax for the same;[8] relieve idiots and insane persons;[9] take the census;[10] administer oaths to town officers, and various other duties.

[1] *Rec. Bost. Select.*, 1742–53, pp. 20–21, 9, 54, 71, 196.

[2] *Acts and Resolves*, I, 253. See countless references in the Selectmen's *Records*.

[3] In Massachusetts they could also try small causes when the magistrate was interested in the suit. *Mass. Col. Rec.*, II, 162.

[4] *Plym. Col. Rec.*, XI, 227–8.

[5] *Plym. Col. Rec.*, XI, 223; *Mass. Col. Rec.*, II, 6, 9; IV, Part I, 256.

[6] *Acts and Resolves*, I, 65.

[7] *Acts and Resolves*, I, 67, 538, 654.

[8] *Acts and Resolves*, I, 131–2.

[9] *Acts and Resolves*, I, 157.

[10] *Acts and Resolves*, I, 443–4.

(*c*).—*Officers appointed by the Selectmen.*

Besides the imposing catalogue of powers and duties already indicated, in the early period the selectmen exercised the right of appointing a large number of minor town officers, most of which, at a later time, were elected in town-meeting: unless, as sometimes occurred,[1] they were authorized by special vote of the latter to nominate them.

Among the officers so appointed were hog reeves,[2] water bailiffs,[3] cow keepers,[4] fence viewers,[5] town drummers and teachers of town drummers,[6] constables,[7] tithingmen,[8] perambulators,[9] town treasurers and recorders,[10] ringers and yokers of swine,[11] pound-keepers,[12] sealers of weights and measures,[13] keepers of ordinaries,[14] town bellmen,[15] cullers of staves and measurers of corn and of boards,[16] corders of wood and overseers of wood corders, overseers of chimneys and chimney-sweepers,[17] overseers of almhouses,[18] gaugers, viewers, and

[1] For examples see *Bost. Rec.*, 1660–1701, pp. 211, 220, 226, etc.

[2] *Bost. Rec.*, 1634–60, pp. 13, etc.

[3] *Bost. Rec.*, 1634–60, p. 11; 1660–1701, p. 16.

[4] *Bost. Rec.*, 1634–60, pp. 69, 104, 116, 119, etc.; *Rec. Bost. Select.*, 1701–15, pp. 32, etc.

[5] *Bost. Rec.*, 1634–60, p. 118; *Dorchester Rec.*, 211.

[6] *Bost. Rec.*, 1634–60, p. 76.

[7] *Bost. Rec.*, 1634–60, p. 95.

[8] *Bost. Rec.*, 1660–1701, pp. 176–7, 185, etc.; *Acts and Resolves*, I, 155, 329.

[9] *Bost. Rec.*, 1634–60, p. 95; 1660–1701, pp. 1, 214, 234, etc.

[10] *Bost. Rec.*, 1634–60, pp. 100, 108; 1660–1701, pp. 161, etc.

[11] *Bost. Rec.*, 1634–60, p. 103.

[12] *Bost. Rec.*, 1634–60, pp. 116, 135; *Rec. Bost. Select.*, 1701–15, pp. 203, etc.

[13] *Bost. Rec.*, 1634–60, p. 108; 1660–1701, pp. 206, etc.; *Acts and Resolves*, I, 70; *Mass. Col. Rec.*, II, 211; IV, Part I, 134.

[14] *Bost. Rec.*, 1660–1701, pp. 178, 215; *Acts and Resolves*, I, 37, 56, 664–5, 680, 717.

[15] *Bost. Rec.*, 1634–60, p. 28; 1660–1701, pp. 11, 18, 22, etc.

[16] *Bost. Rec.*, 1660–1701, p. 206.

[17] *Bost. Rec.*, 1660–1701, p. 207; *Acts and Resolves*, I, 577; V, 1119.

[18] *Bost. Rec.*, 1660–1701, p. 213.

surveyors of casks of tar,[1] firewards,[2] and informers of offenders against the license laws.[3]

(*d*).—*Extracts from the Selectmen's Records.*

A few typical passages from the original minutes of the selectmen may prove interesting as well as instructive. For instance, the maintenance of the constable's watch—that primitive institution from which the entire English police system has been evolved—was the subject of countless orders. It was the constable's duty, under direction of the selectmen, to "set" the watch, which was composed of the inhabitants themselves serving by turns.[4] The following general "instructions" for regulating the watch were adopted by the Boston selectmen in 1662.[5]

"1. That the watch shall be set & attend theire charge att nine of the clocke in the Eueninge, and not dismissed vntell 5 in the morning & shall be dismissed by the Counstable or one apointed by the Counstable.

"2. Because the Towne hath beene many times betrusted with a watch consistinge of youths, That therefore from henceforth the Counstable shall see to it, that one halfe of the watch att least be householders, & such as the charge of y^e^ Towne (soe farr as respects watchmen) may be committed to.

"3. That the Counstable shall discharge from watchinge

[1] *Acts and Resolves*, I, 573.

[2] *Acts and Resolves*, 1, 677.

[3] *Acts and Resolves*, I, 681.

[4] In 1646 the general court of Massachusetts declared it to be "y^e^ intent of y^e^ lawe, y^t^ ev^r^y p'son of able body, (not exempted by lawe,) or of estate sufficient to huire anoth^r^, shalbe liable to watch, or to supply it by some oth^r^, when they shalbe thereunto required; & if there be in y^e^ same house diverse such p'sons, (wheth^r^ sonnes, servants, or soiourn^rs^,) they shall all be compelable to watch as aforesaid." *Mass. Col. Rec.*, II., 151. Cf. the elaborate statute regulating the watch in *New Haven Col. Rec.*, I, 33–4.

[5] In Boston the watch was composed of 8, 10, or 12 men; it was usually first set on May 1, and was kept up for six months.

in their owne persons, any that are of notorious euill life & manners & likewise such as would watch two nights togeather, not haueing sufficient sleepe betweene.

"4. The number of persons ordinarily shall be eight, beside the Counstable or his deputie, one of w^{ch} shall be vpon the watch euery night, to looke after the exact performance of the charge, & the deputy shall be some man of trust.

"5. The place where the watch shall make appearance shall bee in the liberty of the Counstable to apoint, and like wise the weapon they serue with."

It was also ordered that the following "charge" should be read to the watch every night:—

"1. That they Sllentlie but vigilantlie walke theire seuerall turnes in the seuerall quarters and partes of the Towne, two by two, a youth allwayes joyned with an elder and more sober person, & two be allwayes about the markitt place.

"2. If after 10 of y^{e} clocke they see any lights, then to make discreett inquiry, whether there be a warrantable cause, likewise if they heare any noyse or disorderlye carriage in any house wisely to demand a reason of it, & if it apeare a reall disorder, that men are danceing, drinckeing, singinge vainlie &c, they shall admonish them to cease, but if they discerne the Continuance of it after moderate admonition, then to acquaint the Counstable of it, or him that hath the care of y^{e} watch for that night, who shall see to the redresse of it & take the names of the persons to acquaint authoritie there with.

"3. That they vigilantlye view the water side & motion of vessels about the shoore, & prudentlie take accompt of such as goe out or come in not hinderinge any in theire lawfull affaires, nor (if it be possible) suffering any to practice vnlawfullye, nor keep any disorder in or about theire vessells.

"4. To look to the great Guns & fortifications.

"5. If they finde any younge men, Maydes, women or other persons, not of knowen fidellitie, & vpon lawfull occation walkeing after 10 of the clocke at night, that they modestly demand the cause of theire being abroad, & if it

apeare that they are vpon ille minded imploym^{t} then to watch them narrowlye & to command them to repaire to theire lodginges, & in case they obstinately refuse to giue a rationall accompt of theire busines, ore to repaire home, then to secure them vntill the morninge.

"6. For as much as the watch is to see to the regulateinge of other men actions & manners, that theirefore they be exemplary themselues neither vseing any vncleane or corrupt language, nor vnmanerlye or vnbeseming tearmes vnto any, but that they behaue themselues soe that any person of quallitye, ore strangers y^{t} ar vppon occation abroad late, may acknowledge that o^{r} watch neglects not due examination, nor offers any iust cause of proucation.

"7. That the Towne house be in a spetiall manner regarded by y^{e} watch to see y^{t} none take tobacco or vse any fire vnder o^{r} about the same.

"8. That any householder being lawfully warned to watch should eithe^{r} himselfe be absent, or not send a sufficient man in his roome y^{e} Counstable may then hire them that are sufficient, & require y^{e} penaltye of the law."[1]

The following typical order shows the notions of our ancestors as to the proper training of apprentices:

"Whereas itt is found by sad experience that many youths in this Towne, being put forth Apprentices to severall manufactures and sciences, but for 3 or 4 yeares time, contrary to the Customes of all well governed places, whence they are uncapable of being Artists in their trades, besides their unmeetenes att the expiration of their Apprentice-ship to take charge of others for government and manuall instructions in their occupations which if nott timely amended, threatens the welfare of this Towne.

"It is therefore ordered that no person shall henceforth

[1] *Bost. Rec.*, 1660–1701, 8–10. This remained in force, with little amendment until 1701, when a revision was made. See *Records*, 1660–1701, pp. 43, 244; 1700–1728, p. 7. On the watch in New Haven see Levermore, 51–8.

open a shop in this Towne, nor occupy any manufacture or science, till hee hath compleated 21 years of age, nor except hee hath served seven years Apprentice-ship, by testimony under the hands of sufficient witnesses. And that all Indentures made betweene any master and servant shall bee brought in and enrolled in the Towne's Records within one month after the contract made, on penalty of ten shillings to be paid by the master att the time of the Apprentices being made free."[1]

The people of New England were exceedingly jealous of the intrusion of strangers into the community. The entertainment of a stranger—that is to say of anyone not an inhabitant of the town—without permission, even when the guest was a near relative of the host, was forbidden under penalty; and the enforcement of this requirement seems to have caused the selectmen constant anxiety. Any number of entries such as the following may be found in the records:

"It is ordered that no Inhabitant shall entertaine man or woman from any other towne or countrye as a sojourner or inmate with an intent to reside here, butt shall give notice thereof to the Selectmen of the towne for their approbation within 8 dayes after their Cominge to the towne upon penalty of twenty shillings."[2]

"This same day Clement Maxfild appeared before the Select men, and desired that his Brother John Maxfild, being arriued lately from England, might Continue in the Towne with him; and that he would secure the Towne, from any dammage, during his residence here, which was granted that he, the sayd Clement Maxfild, might, entertaine his brother

[1] *Bost. Rec.*, 1634–60, pp. 156–7. This was an order of the town-meeting. The indentures were filed with the selectmen and entered in their records. See examples of them in *Bost. Rec.*, 1660–1701, pp. 7, 28, 37, etc. A very unique apprentice's indenture will be found in the New Hampshire *Town Papers*, XI, 688. For another see New Hampshire *Provincial Records* in *Coll. N. H. Hist. Soc.*, VIII, 287.

[2] *Bost. Rec.*, 1634–60, p. 90. Cf. *Dorchester Town Records*, 130.

as is above expressed, vntill such time, as his Brother, shall otherwise settle himself heere or elsewhere."[1]

The selectmen were a remarkable institution; and it cannot be reasonably doubted that much of the wonderful success of the famous New England town government was due to the efficiency of the representative board. Only through the wisdom and executive skill of such a body, not too cumbrous for a sufficiently rapid transaction of business, could the country village have grown into a populous borough, without clothing itself in the centralized organism of a municipality. And, vast and numerous as were their powers, there is little evidence in the records of any serious encroachment on the prerogative of the town-meeting.[2]

V.—The Town Officers and their Duties.

(*a*).—*Principal Officers.*

In Rhode Island the principal functionary of the town, originally, was styled the "head-officer." By the Code of

[1] *Dorchester Town Rec.*, 124. See also cases of fines: *Ib.*, 137. Cf. *Province Laws of New Hampshire* in *Coll. N. H. Hist. Soc.*, VIII, 34, for an act regulating entertainment of strangers. Security for good behavior might be exacted at any time:

"Richard Way is admitted into the Town, provided that Aron Way doe become bound in the sum of twenty pound sterll. to free the Town from any charge that may accrew to the town by the said Rich^d^ or his family.

"I, Aron Way, do heerby engadge my selfe, my heires, executors, &c., unto the selectmen of the Town of Boston and their successours in the sum of twenty pound sterll. in behalfe of my Brother, Richard Way, and his family, that they shall not be chargeable to the Town and hereunto set my hand.

"ARON × WAY
"his marke."

Bost. Rec., 1634–60, pp. 136–7. Cf. *Ib.*, p. 143; *Rec. Bost. Select.*, 1701–15, p. 25. Security seems especially to have been exacted in case of craftsmen brought into the town to ply their trades. See for example, *Dorchester Town Rec.*, 131.

[2] For much information relative to selectmen, as well as to the town government as a whole, particularly in its relation to the Assembly, see the *New Hampshire Town Papers*, Vols. XI, XII.

1647 he was given the probate of wills;[1] but this duty was subsequently transferred to the town council, for the reason, as recited in an act of 1674, that the name of head-officer "by the present constitutions is extinct."[2] The records furnish little information as to his other duties.

But, as a rule, throughout New England the constable, though perhaps not equal in rank or social prestige to the clerk, must be regarded as the constitutive officer of the township.[3] In the formation of a new community almost any other functionary could be dispensed with; but without a constable there could be no town.[4] Besides a vast number of police and other executive functions, many of which have always been performed by the constable, it was his duty to give "warning" of town-meetings, command the watch, collect taxes and render account of the same to the colonial[5] or local treasurer, settle claims against the town or colony,[6] and return to the general court the names of deputies elected by the towns.[7]

The town-clerk or recorder[8] was a most important and influential officer. As clerk of the town-meeting he was the direct representative of the old vestry clerk; and he was required, in addition, to record the proceedings of the selectmen.[9] In the Plymouth jurisdiction the clerk's leading duties were summarized in the oath of office:—

"You shall faithfully serue in the office of a towne Clarke . . . for this p^{r}sent yeare and soe longe as by mutuall consent

[1] *Rhode Island Col. Rec.*, I, 188.

[2] *Rhode Island Col. Rec.*, II, 526; Durfee, *Gleanings*, 32-3; Arnold, I, 369.

[3] See *Mass. Col. Rec.*, I, 223, 238, for striking illustrations of the constable's constitutional position.

[4] Dr. H. B. Adams, *Norman Constables*, 21.

[5] *Mass. Col. Rec.*, I, 179.

[6] *Mass. Col. Rec.*, I, 261.

[7] *Mass. Col. Rec.*, I, 220; IV, Part I, 203.

[8] In Boston the "recorder" was usually appointed by the selectmen until March, 1692–3, when a town clerk was first chosen. See *Bost. Town Rec.*, 1660–1701, p. 113.

[9] *Acts and Resolves*, I, 65, 218.

the towne and you shall agree; during which time you shall carefully and faithfully keep all such Records as you shalbee Intrusted withall and shall record all towne actes and orders and shall enter all towne graunts and Conveyances you shall record all beirthes marriages and burialls that shalbee brought vnto you within youer towne and shall publish all Contracts of marriages you shalbee required to doe. . . ."[1]

In Massachusetts, likewise, all these ordinary duties of public recorder were performed by the clerk;[2] and besides, under the later laws, he was required to register all horses feeding upon the common pastures;[3] enter strays and lost goods;[4] record certificates of searchers of tar;[5] keep a "toll booke of all horses and horse-kind" shipped for transportation.[6] In Connecticut[7] and Rhode Island[8] the functions of the office were substantially the same as in the two older jurisdictions.

It appears that, in Massachusetts, the registration of births, deaths, and marriages was sadly neglected by town clerks, at least in the early period. Therefore the general court imposed the duties of registrar upon the clerk of the writs in each town, under penalty for every neglect, requiring him to make annual return of all names registered to the recorder of the county court.[9] The office of "Clarke of the writts" seems to have been created in 1641, primarily to issue summons and attach-

[1] *Plymouth Col. Rec.*, XI, 107–8. See the act instituting the office, 1647. *Ib.*, 189–90.

[2] *Acts and Resolves*, I, 104, 105, 110.

[3] *Acts and Resolves*, I, 138–9.

[4] *Acts and Resolves*, I, 326.

[5] *Acts and Resolves*, I, 633.

[6] *Acts and Resolves*, I, 444.

[7] *Conn. Col. Rec.*, 1678–89, p. 53 (form of oath); 1689–1706, pp. 398, 409; 1706–16, pp. 82, 441; 1771–25, pp. 280, 501, 161, 348.

[8] *Rhode Island Col. Rec.*, I, 187.

[9] In 1642: *Mass. Col. Rec.*, II, 15; and in 1657: *Ib.*, IV, Part I, 290. Cf. *Ib.*, I, 275–6. But town clerks still performed the function. See *Salem Rec.*, 148.

ment.[1] Originally incumbents were appointed by the general court, but subsequently it was ordered that they should be licensed by the shire court or court of assistants;[2] and the town records show that those presented for license were first nominated in town-meeting.[3] Under the Province laws the duties of this office were included among those of the clerk.[4]

Other important officers of the town were the treasurer, assessors, collectors,[5] surveyors of highways, clerks of the market, and fence viewers.[6] Of these the last two only will receive special mention.

It was the duty of the clerks of the market to see to the enforcement of the numerous ordinances relating to the market, particularly those forbidding "forestalling" and "engrossing" provisions[7] and the offering of produce for sale save only in the market place and during the prescribed hours, and those relating to hawkers and hucksters and the like.[8]

The office of fence viewer was very important, especially in the early period, and innumerable ordinances were enacted for regulating his duties. For example:—

"It is ordered that All fences as well generall as p'ticular

[1] *Mass. Col. Rec.*, I, 344–5. See also *Province Laws of New Hampshire*, in *Coll. of New Hampshire Hist. Soc.*, VIII, 31.

[2] *Mass. Col. Rec.*, II, 188 (1647).

[3] See *Bost. Rec.*, 1660–1701, pp. 100, 103, 130, 197; *Dorchester Rec.*, 116; *Salem Rec.*, 148, 195.

[4] *Acts and Resolves*, I, 75, 283, etc.

[5] Often, of course, the constable was *ex officio* collector; and the duties of assessor were frequently performed by the selectmen. But special officers for these duties were often mentioned in the records.

[6] Called also "surveyors of fences." See *Salem Town Rec.*, 40, 110, etc.; "overseers" of fences: *Bost. Town Rec.*, 1634–60, p. 4; also "hayward:" *Bost. Town Rec.*, 1660–1701, p. 222.

[7] The dread of forestallers and engrossers was characteristic of the economy of the age and caused much local legislation in Old as well as New England. See Mr. Hamilton's *Quarter Sessions*, 91 ff.

[8] See an elaborate ordinance in *Bost. Town Rec.*, 1729–42, pp. 46–8. Cf. Ib., 70–72, 77; *Acts and Resolves*, I, 65, 79, 253, etc.

about the towne shalbe sufficientlie made & maintained all the yeare as well in winter as sum̄er. And if any p'son be defectiue in their fences, They are to pay twoe shillings for euery day it is proued they are defectiue, twelue pence thereof to be giuen to the surveyer that finds it out & giues notice of it to the p'tie so defectiue & twelue pence to the towne. And further the said p'tie shalbe lyable to pay all dam̄ages besides, that shall be don by any cattle or swine by reason of that defect."[1]

But perhaps the three most characteristic town functionaries, certainly among the busiest, were the hog reeve, the pound keeper,[2] and the common driver. Their duties were, of course, complementary to those of the fence viewers. The feeding of swine seems to have been fully as important a vocation among the early New Englanders as it was among their ancestors in the days of Eadgar;[3] and the care of them was the cause of constant anxiety and much legislation. Many special acts were passed by the general court relating to the trespasses of swine running at large;[4] and in 1636 it was ordered that each town should choose annually "some one discreet p'son, who shalbee called the hogreeve," to see to the execution of the laws.[5] By a subsequent act, however, all prior orders of the court were repealed, and the towns were empowered to make such by-laws on the subject as they should see fit.[6] The following is a specimen of town ordinances for direction of the hog reeves:—

[1] *Salem Town Rec.*, 110. Cf. *Boston Town Rec.*, 1634–60, pp. 39, etc.; *Dorchester Town Records*, 36; *New Haven Col. Rec.*, I, 207–8; *Plym. Col. Rec.*, XI, 116, 200, 255.

[2] Called also "pounder:" *Newark Town Rec.*, 13; "pound master:" *Ib.*, 182; and "fould-keeper:" *Bost. Town Rec.*, 1634–60, p. 17.

[3] See the interesting discussion by Dr. H. B. Adams in *Norman Constables*, 34–5.

[4] *Mass. Col. Rec.*, I, 87, 101, 106, 110, 119, etc.; *Rhode Island Col. Rec.*, I, 67, 68, 117, 151, etc.; *Plym. Col. Rec.*, XI, 15, 27, 30, 257.

[5] *Mass. Col. Rec.*, I, 181–2.

[6] *Mass. Col. Rec.*, I, 215 (1637), II, 190.

"At the same meeting[1] to that end our medowes and corn-feilds should be preserued from damage, it is ordered that all swine that goe vpon the common from three months old and vpward shalbe ringed with two sufficient rings in each swines nose well put in, and to be ringed by the tenth of march and so continue from time to time till the last of September and to that end they may be soe we doe furder order that those men that are chusen to look after swine shall haue sixepence a swine for euery swine that they find vnringed in the towne from three months old and vpward."[2]

The field driver,[3] cow keeper,[4] herder, or neatherd,[5] like the hog reeve and pounder, was usually elected in town-meeting. Often one or more were chosen for each herd,[6] or to drive a particular field or lot, or the cattle of a certain prescribed district.[7] The driver's fees were usually paid by the owners of the cattle according to a tariff fixed by vote of the people; and, by the same authority, the time in the spring when the cattle should be put upon the pastures and the number of hours during which they should be fed each day, were established:—

"Agreed at the generall towne meeting that Laurance Southweeke & William Woodbury shall keepe the milch cattell & heifers that are like to calue this sum̄er, & such bulls as are necessarie for the heard: excluding all other dry cattell: They are to haue for their labo^{rs} Thirtie & six pownds, to be paid in equall portions the first paym^{t} to be paid the 10th day of the ffourth moneth next & the latter paymt to be made the 10th day of the seauenth moneth follow-

[1] Of the selectmen.

[2] *Records of Groton*, 36. See *Ib.*, 29; also *Boston Rec.*, 1634–60, p. 40; *Dorchester Rec.*, 25, 45–6.

[3] So in *Braintree Rec.*, 29, as equivalent of "hayward."

[4] The more common designation. So for example in *Boston Records*.

[5] Thus in *Salem Records*, 41.

[6] See, for example, *Records of Groton*, 36, 42, etc.

[7] *Rhode Island Col. Rec.*, I, 96 (*Records of Newport*).

inge. They are to begin to keepe them, the 6th day of the 2d moneth. And their tyme of keeping of them to end, the 15th day of the 9th moneth. They are to driue out the Cattell when the Sun is halfe an hower high, and to bring them in when the sun is halfe an hower high. The Cattle are to be brought out in the morning into the pen neere to Mr. Downings pale. And the keep's are to drive them & bring such cattle into the Pen as they doe receaue from thence. And such as doe not bringe their cattle in due tyme into the Pen are to keepe them that day themselues & pay such damages as their cattle shall make."[1]

But every town did not have a pen for the accommodation of the driver. Here is another plan:—

"It is ordered that Jo: Maudsly and Nicholas Wood shall keepe the Cowes for this yeere in the ordinary Cow pasture, and to keepe them from the 15th Day of Aprill next to the first of November next, the sayd keepers to blow their horne at fyue of the clocke in the morneing at Joseph Pharneworth and so along the Towne till he come to Mr Meinots, and every man one the North side of the Towne to bring their Cowes befor the meeteing house, the Rest to bring their Cowes beyound Mr Stoughtons dore, or elce the keep's to driue away the heard, and not to stay for the rest."[2]

Not only did the town have common pastures and common fields, but it possessed also its own cattle and other animals.[3] The town bull, in particular, was a regular institution throughout New England.[4]

The following are typical orders:—

"It is ordered, that there shall be provision made of Bulls

[1] *Salem Records*, 99 (1640). Cf. *Ib.*, 41–2, 66, 85, 86, 100, etc.

[2] *Dorchester Records*, 38. Cf. *Ib.*, 22, 45, 47, 60, 61, etc. See *Rhode Island Col. Rec.*, I, 96. Goats were herded in the same way. *Salem Rec.*, 87, 92, 97, etc. Oxen and steers were kept by separate drivers. *Dorchester Rec.*, 62.

[3] See Dr. H. B. Adams, *Village Com. of Cape Ann and Salem*, 56–8.

[4] There were also town rams: *Salem Town Rec.*, 39.

into the Towne. A Bull to every twenty Cows and heyfers by the first of May, 1640."[1]

"Voted. That whoever shal keep any Cow going at large within the Neck of Boston Shal pay into the hand of Such Person as the Select men Shal appoint to Receive the Same, the Sum of fiue Shillings & Six pence per Annum to be Imployed towards providing four Bulls to goe on the Comon from the first of aprill to the first of Novemb^{r} and two Bulls from thence to the first of Aprill following, for paying the Cowkeeper, with Six pence per Head for a Certificate from the Said Receiver that the owner has paid . . . , And any Cow that Shal be found on the Common whose owner has not a Cirtificate . . . Shal be by the Cowkeeper Impounded and the Owner pay before the Said Cow be discharged three Shillings."[2]

Still other town officers, whose duties are particularly interesting, were the overseer of the poor;[3] the tithingman—

[1] Records of Newport in *Rhode Island Col. Rec.*, I, 96. See for New Haven, *Levermore*, 70.

[2] *Boston Town Rec.*, 1700–1728, p. 176. Cf. *Ib.*, 171; *Salem Town Rec.*, 99.

The "herder" of a western village who gathers up the cows of the inhabitants—to the sad discomfiture of lawns and street-borders—and drives them forth to pasture upon the neighboring "speculator's" lands, inherits his name and functions from his ancestor of Salem or Dorchester; but he has fallen to a low estate: no longer is he called to official honors by the "most voices" of his peers in folkmoot assembled, and his stipend is a matter of private contract.

It is not without interest to learn that the town-bull has found a place in the institutional history of a western state. Dr. L. W. Weeks, commenting on the early history of Milwaukee, says in connection with one Marshal Schuney, an "old settler:" "Among other acts of the Council at that time was the appropriation of seventy-five dollars for a *town bull!* and Schuney had charge of him. He was a fine large white fellow, and did good service. Frequent appropriations were made during the winter for pay and feed for the animal. One Sunday morning, during the following spring, when Lindsay Ward was President of the Corporation, and the family were at breakfast, Schuney came rushing into the house, and exclaimed, "*Mr.* President, *the town bull* is *dead!*" *Wisconsin Historical Collections*, IV, 286–7.

[3] First chosen in Boston, 1690–1: *Bost. Town Rec.*, 1660–1701, p. 206. See *Ib.*, p. 204 for an example of "instructions" to overseers.

a sort of Sunday constable who preserved order in meeting and discharged various police functions of a secular nature;[1] the town drummer, whose duty it was to sound the alarm in case of danger, give the signal for setting or discharging the watch, announce the hour for going to church, call town-meetings, and beat the morning and evening drum at the appointed times;[2] the town crier for crying lost articles and estrays;[3] the bellman—a sort of special watchman whose duty it was in Boston, "to walke through and about the Towne from 12 clocke at nighte to 5 in the morning," in case of "any extreordnary light or fier in any house o^{r} vesselles," to repair to the same and, if there be danger, to ring the alarm;[4] the water-bailiff whose business it was to secure anchors cast upon the "flatts,"[5] collect colonial charges on mackerel taken,[6] and "see that noe annoying things eyther by fish, wood or stone or other such like things, be left or layd about the sea shore."[7]

(*b*).—*New England Functionalism.*

In addition to the imposing list of officials already enumerated the town records mention a vast number of minor public functionaries not all of whom, of course, are found existing at the same time in the same community. Indeed there seems to have been a restless anxiety in these little democracies to bring every possible subject within the purview

[1] See *Plym. Col. Rec.*, XI, 253; *Mass. Col. Rec.*, V, 241, 133; *Acts and Resolves*, I, 155, 228–9.

[2] See for New Haven, *Levermore*, 60–2; also *New Haven Col. Rec.*, I, 70; *Bost. Town Rec.*, 1634–60, pp. 67, 75, 76, 80, 82, etc. A *teacher* of the town drummer was also appointed: Ib., 76.

[3] *Bost. Town Rec.*, 1660–1701, pp. 30, 108.

[4] *Bost. Town Rec.*, 1660–1701, p. 11; see also *Ib.*, pp. 18, 44, etc.

[5] See *Bost. Town Rec.*, 1660–1701, p. 16, where a rather lengthy ordinance defining his duties may be found.

[6] *Plym. Col. Rec.*, XI, 228.

[7] *Bost. Town Rec.*, 1634–60, p. 11.

of the town-meeting or of the magistrates chosen by it. There was a minute interference with private business, a degree of official intrusion which we should now feel intolerable. Thus a large corps of officials were employed in regulating local trade and commerce: such as sealers of weights and measures, sealers of leather, sealers and inspectors of brick-makers,[1] cullers of fish, cullers of staves, inspectors of hides for transportation,[2] measurers of grain, measurers of boards, measurers of salt, packers of flesh and fish, inspectors of the killing of deer,[3] preservers of deer[4] and deer reeves,[5] surveyors of lumber,[6] measurers, sealers, or surveyors of wood,[7] besides corders of wood and overseers of wood-corders.[8] There were also overseers of almshouses, school-wardens, school teachers, truck-masters,[9] keepers of ordinaries, brewers,[10] rebukers of boys,[11]

[1] *Bost. Town Rec.*, 1660–1701, pp. 183, 196; *Acts and Resolves*, I, 683.

[2] *Bost. Town Rec.*, 1660–1701, pp. 196, 206, 147.

[3] *Braintree Town Rec.*, 229.

[4] *Worcester Town Rec.*, 1740–53, p. 18.

[5] Deer-reeves were regularly chosen in Worcester: *Wor. Town Rec.*, 1753–83, pp. 162, 172, etc.

[6] *Braintree Town Rec.*, 229, 547.

[7] For example in 1740, in Boston, it was complained that the cordwood was "cut too short" and "not close stowed." Therefore it was ordered "that there be a Sufficient Number of Sealers or Measurers of Cord-Wood, approved off by the Select Men, and under Oath, to Prosecute all such Person and Persons whatsoever, as shall presume or attempt to cart or carry away any Cord-Wood from any Wharf, before he has duly Corded, and Sealed the same." *Town Rec.*, 1729–42, p. 255; see *Braintree Rec.*, 547.

[8] No one but the official corder, who was bound by oath, could cord wood for sale. See *Boston Rec.*, 1660–1701, p. 59; 1700–28, pp. 14, 224, etc.

It was also ordered that "if the ouerseers of wood cord^{rs} finde any corders unfaithfull or defective in theire office by cording it againe by any man y^{t} is not a cord^{r} apoynted or any other way make it apeare y^{t} y^{e} s^{d} corder was not faithfull accor. to his oath, the said corder shall lose his wages . . . & be disabled to cord any more wood for the yeare ensueinge;" *Boston Rec.*, 1660–1701, p. 144.

[9] *New Haven Col. Rec.*, I, 43; *Mass. Col. Rec.*, I, 96.

[10] See *Levermore*, 69–70.

[11] *Newark Town Rec.*, 77, 80; *Dorchester Town Rec.*, 230.

sizers of meadows,[1] warners of town-meetings,[2] persons to keep dogs out of church,[3] scavengers,[4] chimney sweepers, overseers of chimneys, viewers of lands,[5] lot layers,[6] judges of delinquents at town-meeting[7] and judges of boundary disputes,[8] branders of cattle,[9] swine yokers and ringers,[10] pinders,[11] jurymen,[12] town-cannoneers,[13] bailiffs,[14] commissioners of small causes, commissioners to carry votes to the shire town, commissioners for equalization of the assessment,[15] and even town fishers,[16] town grubbers,[17] and town doctors.[18] To these must be added

[1] *Newark Town Rec.*, 21, 27.

[2] *Newark Town Rec.*, 14; usually, of course, the constable performed the duty of warner; there were also "callers" of town-meetings; thus Rowley, Mass., had both callers and warners: *Early Rec. of Rowley* in *Hist. Coll. Essex Inst.*, XIII, 255, 256, etc.

[3] *Town Rec. of Wenham* in *Coll. Essex Inst.*, XIX, 106.

[4] See *Bost. Town Rec.*, 1660–1701, pp. 205, 226, etc.

[5] *Salem Town Rec.*, 165.

[6] *History of Chester*, in *Coll. N. Hamp. Hist. Soc.*, 349.

[7] "Chosen to judge defects of them that are fined for not comming to towne meetings:" *Early Rec. of Rowley*, in *Hist. Coll. Essex Inst.*, XIII, 255, 256, 257, etc.

[8] *Early Rec. of Rowley*, in *Hist. Coll. Essex Inst.*, XIII, 254.

[9] See Baily, *Hist. of Andover*, 138, 143, etc.

[10] *Bost. Town Rec.*, 1634–60, pp. 103, etc.; 1660–1701, p. 30.

[11] The pinder was an old officer of the manor—a sort of pounder or hayward. Rowley, Mass., had both pounders and pinders: *Early Rec. of Rowley*, in *Hist. Coll. Essex Inst.*, XIII, 254, 256, 258, etc.

[12] *Bost. Town Rec.*, 1660–1701, p. 127; *Mass. Col. Rec.*, I, 118; II, 285; *Acts and Resolves*, I, 37.

[13] *Bost. Town Rec.*, 1700–1728, p. 17; chosen "to keep the accompt of the Great Artillery" and look after the town's stock of ammunition.

[14] *Dorchester Town Rec.*, 72, 88, 103, etc. The Dorchester bailiff was a sort of extra petty constable side by side with the regular petty constable.

[15] For these three classes of commissioners see Chap. VII.

[16] See Paige, *Hist. of Camb.*, 38, where John Clarke is engaged to catch "alewives" for the town at iii^{s}, 6^{d} a thousand.

[17] Oct. 3, 1636. "Agreed with Mr. Cooke to take up all the stubs that are within the bounds of the town, that is, within the town gates; he is to have ix^{d} apiece for taking up the same and filling holes all above iii inches [deep], which he is to do before the first of December, or else to forfeit 5^{l}.:" Paige, *Hist. of Cambridge*, 39–40.

[18] See *Levermore*, 67.

the town deputies and the local officers commissioned by the general court, such as notaries[1] and the commissioners to join in marriage.[2]

The foregoing catalogue is certainly formidable; yet we shall still fail to comprehend how large was the army of local public servants in New England unless we bear in mind that the honors of a single office were often shared by a considerable number of individuals. For example, in 1679, Dorchester had four yokers and ringers of swine, four men to look after boys in church, and eighteen fence viewers for nine different fields;[3] and in 1681 there were thirteen tithingmen.[4] In 1713–14, the town-meeting of Braintree elected two constables, four tithingmen, four surveyors of highways, four fence viewers, and four hog reeves.[5] In 1769 Worcester had two constables, two field drivers, two fence viewers, two deer reeves, eight hog reeves, and eleven surveyors of highways.[6] In 1690–91 Boston had ten constables,[7] seven surveyors of highways, four clerks of the market, four sealers of leather, six hog reeves, three criers, sixteen corders of wood, eight overseers of wood-corders, four overseers of chimneys, and thirty-six tithingmen.[8]

[1] *Mass. Col. Rec.*, I, 307; II, 209.

[2] *Mass. Col. Rec.*, II, 166; I, 307.

[3] *Dorchester Town Rec.*, 230.

[4] *Dorchester Town Rec.*, 256.

[5] *Braintree Town Rec.*, 81–2.

[6] *Worcester Town Rec.*, 1753–83, pp. 161–2.

[7] Including two for Muddy River and Rumny Marsh.

[8] *Boston Town Rec.*, 1660–1701, pp. 204–7. In 1808 Newark, N. J., had 7 constables, 2 surveyors of highways, and 31 overseers of highways. See *Newark Town Rec.*, 194–5.

CHAPTER III.

THE TOWNSHIP AND ITS DIFFERENTIATED FORMS IN THE MIDDLE AND SOUTHERN COLONIES.

I.—The Tithing.

The township in its New England form is of paramount interest to the student, both on account of the invaluable services which it rendered during the long period of preparation for national union, and on account of the influence which it has exerted on local institutions elsewhere in the United States. Nevertheless during the colonial era several of the allied organisms have a history by no means unimportant. This is so particularly of the manor and the parish. On the other hand the tithing as a local division seems never to have been permanently transplanted to American soil.[1] Tithingmen

[1] Tithings seem to have existed, however, in Maine. Sir Ferdinando Gorges, in describing the form of government established there, declares that he "divided the whole into eight bailiwicks or counties, and those again into sixteen several hundreds, consequently into parishes and tithings, as people did increase and the provinces were inhabited." Further on he adds: "Every hundred shall have two head constables assigned them, and every parish one constable and four tithingmen, who shall give account to the constable of the parish of the demeanor of the householders within his tithing, and of their several families. The constable of the parish shall render the same account ... to the constables of the hundred ... who shall present the same to the lieutenant and justices at their next sitting, or before if cause require," etc. See Gorges, *Description of New England* in 3 *Mass. Hist. Coll.*, VI, pp. 83, 85. Here the tithingman seems to be subordinate to the parish constable just as the latter is subordinate to the constables of the hundred; but is the tithing a personal or a territorial division of the parish?

were regular officers of the New England town; and they also appeared elsewhere in the colonies.[1] Moreover in one instance, at least, we find something very like the personal *teothung* of Saxon days—a union of heads of families for police purposes. In 1682 the general court of Plymouth, for the better regulation of the Indians and that they "may be brought to liue orderly soberly and dilligently," enacted that in each town where Indians live "some one able discreet man" should be appointed by the court of assistants to have oversight of such Indians. The overseer and the Indian tithingmen of the town were to constitute a court for trying causes betwixt Indian and Indian "capitalls and titles vnto lands onely excepted;" and they were to appoint constables of the Indians yearly to attend the court and serve its processes. Also it was ordered "that in each towne where Indians doe reside euery tenth Indian shalbe chosen by the Court of Assistants or said ouerseer yeerly whoe shall take the Inspection care and ouersight of his nine men and present theire faults and misdemenors to the ouerseer which said ouerseer shall keep a list of the Names of the said Tithing Men and those they shall haue the charge of and the said tithingmen shalbe Joyned to the ouerseer in the Adminnestration of Justice and in hearing and determining of causes and incase the Tithingmen doe not agree with the ouerseer in any case that may come before them in Judgment then the said ouerseer shall haue Negatiue voyce and such case shalbe remoued to be determined by the court of Assistants."[2]

This is certainly a very curious revival of the most ancient form of the tithing, but the name seems never, as in the old country, to have been used here as the designation for a district or territorial area identical with the township itself.

[1] For example in Maryland: see Dr. Adams, *Saxon Tithingmen*, p. 8, citing *Bacon's Laws of Md.*, ch. II, 12.

[2] *Plym. Col. Rec.*, XI, 252–3. Cf. Dr. Adams, *Saxon Tithingmen*, 9–10.

II.—Dutch Colonies and Village Communities.

The history of local institutions in the Middle Colonies, and more especially in New York, presents some very curious features. It is exceedingly interesting, for example, to see the feudal tenures of Europe, transplanted directly to the banks of the Hudson.[1] In 1629 the Dutch West India Company, with the sanction of the States General of Holland, instituted in New Netherland the celebrated "colonies" or manors under the proprietorship of "patroons." In the "Freedoms and exemptions" granted by the Assembly of XIX in that year, it was provided that any person who should within four years after giving notice to any of the Chambers of the Company, plant a colony of fifty souls, upwards of fifteen years old, should be acknowledged as a patroon, and be "permitted, at such places as they shall settle their colonies, to extend their limits four[2] miles along the shore, that is, on one side of a navigable river, or two miles on each side of a river, and so far into the country as the situation of the occupiers will permit." The spaces between the colonies were reserved by the Company for such disposition as they should see fit; but no person was to be allowed to settle within "seven or eight miles" of the colonies without their consent, except that the Commander and Council for good reasons should order otherwise.[3]

[1] A mere resume of the subject of local institutions in New Netherland is here attempted. The whole subject is treated at length from the sources in the *Dutch Village Communities on The Hudson River* by Mr. Irving Elting, to which I am chiefly indebted. The leading authorities are O'Callaghan, *History of New Netherland*, and Brodhead, *History of New York*, vol. I; while original materials will be found in *Documents Relating to the Colonial History of New York;* volumes XIII and XIV of the collection, edited by Mr. Fernow, are devoted entirely to the towns and settlements on Long Island and the Hudson and Mohawk rivers. The Holland documents, comprised in volumes I and II, contain much matter relative to the patroons.

[2] Sixteen English miles.

[3] See O'Callaghan, *History of New Netherland*, 112–20, where the "Freedoms

No rights of self-government were granted the colonists, though they were exempted from taxation for a period of ten years. They were required to serve the patroon during the term for which they had bound themselves; and should they leave him the company engaged to do everything in their power to apprehend and deliver them to their master. The patroon was granted his land as a perpetual inheritance, together with the "fruits, rights, mines, and fountains therof," besides a monopoly of the "fishing, fowling, and grinding." To him belonged also the lower jurisdiction, with appeal to the Commander and Council from the judgments of his court for upwards of fifty guilders—about twelve dollars.

Thus, unfortunately, were established in the New World institutions which, says the historian of New Netherland, bore "all the marks of the social system which prevailed at the time, not only among the Dutch, but among the other nations which had adopted the civil law. The 'colonies' were but transcripts of the 'lordships' and 'seigneuries' so common at this period, and which the French were establishing, contemporaneously, in their possessions north of New Netherland, where most of the feudal appendages of high and low jurisdiction, mutation fines, pre-emption rights, exclusive monopolies of mines, minerals, water-courses, hunting, fishing, fowling, and grinding, which we find enumerated in the charter to patroons, form part of the civil law of the country at the present day." [1]

Naturally a policy which denied to the settlers who should quit their native land to face the toils and dangers of the savage wilderness, the liberties which they had enjoyed at home, was not favorable to the prosperity of the Company. It was found expedient, therefore, in 1640, to grant a new charter, which, besides modifying the privileges of the patroons,

and Exemptions" are printed; also Brodhead, *History of New York*, I, 196–8; Hazard's *Annals*, 21–2.

[1] O'Callaghan, *Hist. of New Netherland*, 120; cf. *Ib.*, 390–91.

created a new class of proprietors. "Whoever should hereafter convey himself, and five souls over fifteen years of age, to New Netherland, was to be acknowledged a 'master or colonist,' and entitled to claim one hundred morgen, or two hundred acres of land, with the privilege of hunting in the public forests and fishing in the public streams. If by these means, the settlements of masters or free colonists should so increase as to become towns, villages, or cities, the Company was bound to confer subaltern or municipal government on them, to consist of magistrates and ministers of justice; which were, however, 'to be selected and chosen by the Director-general and council, from a triple nomination of the best qualified in the said towns and villages, to whom all complaints and suits arising within the district shall be submitted;' but from these courts, as well as from those of the Patroons, an appeal was to lie to the Director-general and council, when the sum in dispute exceeded one hundred guilders, or forty dollars, or when infamy might attach to the sentence; as well as for all judgments in criminal proceedings, when the same was allowed by the custom of Fatherland."[1]

By this charter of liberties local self-government, such as had existed in Holland, was introduced into the New World. Gradually a large number of hamlets and villages sprang up in New Netherland, particularly on Long Island, possessing their own magistrates and managing their own local business.[2] In their economic aspect these were veritable mark-societies, closely allied in character to the New England town-communities, but transplanted directly to American soil from the Teutonic fatherland of the English race.[3] Each village had its "boueries" or house-lots, its common fields and pastures, and its folkmoot for the ordering of its domestic affairs.

[1] O'Callaghan, *Hist. of New Netherland*, 220; cf. Brodhead, *Hist. of New York*, I, 311–12; *Doc. Rel. to Col. Hist. of N. Y.*, I, 119–23. Cf. *Ib.*, 401–5 for the *Liberties* of 1650.

[2] O'Callaghan, *Hist. of New Netherland*, 390–3.

[3] This point is emphasized by Elting, *Dutch Village Communities*, 67–8.

Under the English rule town and county government was instituted; but there was little arbitrary interference in the management of local matters. Instead of the colonies of patroons, in some instances, manors on the English model with courts leet and baron were substituted or established;[1] and the system of common land-holding survived in some of the New York towns to the present century.[2]

III.—The Town of the Duke's Laws.

After the English conquest of New Netherland in 1664 a body of laws was promulgated,[3] primarily for the government of Long Island, but subsequently enforced with some modifications in other parts[4] of the territory claimed by the Duke of York.[5] By this code was established a system of local govern-

[1] Lodge, *Short History*, 327–8; Elting, 16–17. Manors continued to be granted after the general abrogation of feudal tenures. See Sir William Johnson to Gov. Colden, April 4, 1769, in O'Callaghan, *Doc. Hist. of N. Y.*, II, 543. Governor Fletcher was notoriously lavish in grants of land. See, in connection with the Cortlandt and Livingston manors, *Doc. Rel. to Col. Hist. of N. Y.*, IV, 822–3. For grant of Grimstead manor, with courts baron and leet, see *Ib.*, III, 72. The manors of Rensselaerswyck, Livingston, and Cortlandt sent each a representative to the Assembly: *Ib.* VIII, 444; *Doc. Hist. of N. Y.*, II, 937. On the manors of Van Rensselaer, Gardiner's Island, and Van Cortlandt, see the interesting series of papers by Martha J. Lamb in *Magazine of American History*, Vols. XI, XIII, XVI.

Manors were classed with townships and precincts in respect of officers and powers under the Province Laws. See Section IV of this chapter.

[2] This subject is discussed in detail by Elting, *Village Communities*, 23 ff.

[3] By Colonel Nicholls, deputy governor for the Duke: Brodhead, *Hist. of New York*, II, 18, 66–7.

[4] Aug. 6, 1674, Governor Andros orders them put in force: O'Callaghan, *Doc. Rel. to Col. Hist. of N. Y.*, III, 226–7. Cf. Dongan's report, *Ib.*, p. 390 (1686); also *Hildreth*, II, 44; Lodge, *Short History*, 296; Brodhead, II, 273.

In 1676 the Duke's laws were enforced in the Delaware region "except the constables' courts, county rates, and some other things peculiar to Long Island:" Hazard's *Annals of Pa.*, 427.

[5] The region west of the Delaware, though not included in the Duke's grant was claimed as part of New Netherland: Hazard's *Annals*, 356–7; Brodhead, I, 735; II, 15–16, 50.

ment similar in spirit to that existing in New England and the mother country, but possessing some remarkably novel features.

The governing body of the town or parish consisted of the constable and eight overseers.[1] Four of the latter were elected every year by a "plurality of the voyces of the free-holders," and the constable was chosen in the same way from among the retiring overseers. In case of emergency or when the constable was not at hand any overseer could "take upon him the authority of a constable, provided that he carry with him the staffe of the office."[2]

The constable and overseers possessed both judicial and legislative powers. As constituting the "Town-Court" they could try actions for debt or trespass not involving more than five pounds; or, if above this amount, they could submit them to arbitration.[3]

It was also enacted that "whereas in perticuler Townes many things do arise, which concerne onely themselves, and the well Ordering their Affairs, as the disposing, Planting, Building and the like, of their owne Lands and woods, granting of Lotts, Election of Officers, Assessing of Rates with many other matters of a prudentiall Nature, tending to the Peace and good Government of the Respective Townes the Constable by and with the Consent of five at least of the Overseers for the time being, have power to Ordaine such or so many peculier Constitutions as are Necessary to the welfare and Improvement of their Towne; Provided they bee not of a Crimminall Nature, And that the Penaltyes Exceed not twenty Shillings for one Offence, and that they be not Repugnant to the publique Lawes," such "constitutions" being subject to the approval of the court of sessions or the assizes.[4]

[1] Subsequently decreased to four: *Duke's Laws*, 69.
[2] *Duke's Laws*, 44.
[3] *Duke's Laws*, 3–4, 51; amended, *Ib.*, p. 60.
[4] *Duke's Laws*, 50–51, 59.

There was a town-meeting whose functions seem to have consisted simply in the election of officers, though they are not clearly defined,[1] and thus the right to enact by-laws, which in the New England towns was exercised by the selectmen co-ordinately with, but under the authority of, the town-meeting, was by the Duke's code vested in the first instance exclusively in the representative board. The constable's position was unique. It is especially noteworthy that while performing the fiscal and police functions incident to the office elsewhere he was here recognized more clearly than anywhere else in the colonies as the head officer and most distinguished personage of the community.[2]

The existing communal and other local customs were not disturbed by the new laws; on the contrary they were distinctly recognized in elaborate measures relative to the use of the common fields, the construction of fences, and the management of the village herds.[3] But by this very recognition and by many enactments relative to the powers of towns the supreme authority of the proprietary government was sufficiently asserted. For example it was found necessary thus to limit the amount of bounties offered for the killing of wolves:[4]

"Whereas it hath been taken into Consideration how great Abatement there is in the Rates of severall Townes upon the Account of Wolves discounted with the Constables, within whose Lymitts they are killed, so that the Summe to be collected doth not Answer the Expectation of the publick Charge, It is Ordered, that the Summe of Twenty five Shillings lately given for a Wolves Head shall be reduced to twenty shillings as formerly, and for Whelps proportionately, and that for the time to come for all Wolves which shall be killd within the

[1] *Duke's Laws*, 51.

[2] On the constable's duties and powers see the *Duke's Laws*, 21–2, 3, 4, 5, 9, 10, 15, 45, 69.

[3] *Duke's Laws*, 15–17, 28.

[4] The bounty for wolves is a constantly recurring item of expenditure in all the New England town records.

Bounds of any Towne upon Long Island and parts adjacent, the one half of the Charge shall bee borne by the Towne and tother by the Publick; It is also Ordered, That each Towne bee obliged for the preservacon of their Stock and Cattle to make and maintain Wolve pitts which are to bee directed by the respective Officers of the Townes to which they do belong."[1]

The following provision reveals another of the exigencies of pioneer life:—

"It is likewise Ordered, In regard of the great Inconvenience and Decay of Feed for Horses and Cattle in the Woods by the increase of the Brush or Under wood, which is suffred to grow up without any care taken to subdue the same, That four Dayes be appointed once every yeare for all the Inhabitants of the Townes upon Long Island and Precincts, from the Age of 16 to 60 (except those exempted by the Law) to go into the Woods to cutt the said Brush or Under wood, the time to bee at the discretion of the Officers of each Towne, and whosoever shall faile therein, each particular person shall pay for every dayes default the value of five shillings."[2]

The parish, as the town in its ecclesiastical aspect was styled, had a distinct organization. At its head stood the constable and overseers, who were to choose yearly out of the latter body two churchwardens. The overseers were to have charge of "making and proportioning the Levies and Assessments for building and repairing the Churches, Provision for the poor, maintenance of the Minister; as well as for the more orderly managing of all Parochiall affairs in other Cases exprest."[3] The chief duty of the churchwardens, as defined in the statutes, consisted in making presentments to the court of sessions. On the second day of each term, they were required to "deliver a true presentment in writing of all such

[1] *Duke's Laws*, 72 (1672). Cf. *Ib.*, 52–3.
[2] *Duke's Laws*, 73 (1672).
[3] *Duke's Laws*, 18.

misdemeanors as by their knowledge have been Committed and not punished whilst they have been Churchwardens. Namely, Swearing, prophaness, Sabbath breaking, Drunkenness, fornication, Adultery, and all such abominable Sinnes." They were consequently empowered to compel the attendance of the witness upon whose complaint the charges were granted.[1]

It was the minister's temporal office to join in marriage,[2] and keep a register of births, deaths, and marriages[3] occurring within the parish. Moreover, it was not intended that he should neglect the cure of souls, his spiritual duties being prescribed in the statutes with curious particularity. It was enacted that the minister of "every Parish shall Preach constantly every Sunday, and shall also pray for the Kinge, Queene, Duke of Yorke, and Royall family; . . . Publiquely Administer the Sacrament of the Lords Supper once every Year at the least in his Parish Church not denying the private benefit thereof to Persons that for want of health shall require the same in their houses, under the penalty of Loss of preferment unless the Minister be restrained in point of Conscience;" neither shall he "refuse the Sacrament of Baptism to the Children of Christian parents when they shall be tendered," nor admit persons of "scandalous or vicious life" to the Sacrament.[4]

[1] *Duke's Laws*, 19.

[2] *Duke's Laws*, 19, 36–7.

[3] *Duke's Laws*, 13–14.

[4] *Duke's Laws*, 18–19. On the Duke of York's Code see also Brodhead, *Hist. of N. Y.*, II, 62 ff.; Hildreth, II, 44 ff.

By the Province Laws New York city and certain other cities, counties, manors, and precincts, were authorized each to choose two churchwardens and ten vestrymen. The churchwardens were *ex officio* overseers of the poor; and the vestrymen together with any two justices could lay a reasonable tax for church purposes: Van Schaack, *Laws of N. Y.*, I, 19 (1693); some modifications in number of vestrymen and in other details were made by subsequent acts: *Ib.*, I, 64 (1704), 267, etc.

IV.—The Town of the New York Province Laws.

The Duke's code remained in force until some time after the establishment of the royal government.[1] There was no interruption in the continuity of local institutions. On the contrary, immediately after the revolutionary period, the existing charters, patents, and privileges of all cities, manors, and towns were expressly confirmed;[2] and from these beginnings was ultimately developed the admirable system of local government which New York still possesses.

By a statute of 1691 it was enacted that, since the respective towns within the province "have distinct ways in their improvements of tillage and pasturage," the freeholders of each should be authorized to hold meetings for the framing of "prudential orders and rules" relating to these matters. At the same time it was provided that three surveyors of fences and highways should be elected in each town.[3]

In the law just cited only *towns* are specifically mentioned; but as a rule manors, precincts, districts, and towns, for the purposes of local government, are treated as co-ordinate bodies, with substantially the same offices and powers,[4] though occasionally the town appears as a superior organization.[5]

[1] Probably until 1691: O'Callaghan, *Introduction to Journals of the Legislative Council of N. Y.*, I, p. v.

[2] Act of May 6, 1691: Van Schaack, *Laws of New York*, I, 2–3. The compilation of Van Schaack, 2 vols. fol., New York, 1774, is my principal source for the institutions of the Province during the eighteenth century. For the loan of a copy of this scarce book I am indebted to the courtesy of Mr. S. T. Viele of Buffalo, N. Y.

[3] Van Schaack, *Laws of N. Y.*, I, 3–4. Fence viewers, however, were subsequently made distinct officers of every town, manor, and precinct: *Ib.*, I, 290.

[4] Thus Dutchess county was divided into precincts with the same powers as towns: Van Schaack, *Laws of N. Y.*, I, 190–1. Ulster county had *both* precincts and towns with equal powers: *Ib.*, II, 468, 570, 692. There were also precincts in Orange county: *Ib.*, II, 448. Albany and Tryon counties were divided into districts with the usual powers of towns: *Ib.*, II., 686.

[5] Cumberland county, for instance, had *both* towns and districts, but the latter were to be retained only until "erected into townships by letters

On the nineteenth day of June, 1703, a law was passed which marks an important epoch in the history of English institutions; for by it was created the essential feature of that system of representative township-county government which now constitutes the highest type of local organization in the United States: a vigorous town government possessing all necessary means of self-help, co-operating with, and in some measure dependent upon, a strong county administration.

The act provides that each town shall annually elect from the freeholders therein two assessors, one collector, and a supervisor; and the latter is significantly described as one "to compute, ascertain, examine, oversee, and allow the contingent, publick, and necessary charges of each county"—the function which everywhere still constitutes the chief business of the county board.[1]

The supervisors are required to hold annual and special meetings at the county town for the discharge of their fiscal duties; but in their respective townships they have few independent functions to perform, except that each, with the collector and assessors, is responsible for the collection of the quit rents for which the inhabitants are liable.[2]

The town-meeting, as we have seen, is a folkmoot with limited legislative powers; and it is authorized to levy taxes for the construction of pounds and public buildings.[3]

patent under the great seal" of the colony: Van Schaack, *Laws of N. Y.*, II, 701. So, likewise, the various manors are usually recognized as equal to towns as civil bodies; but when supervisors were first created, manors were not given equal representation on the county board: *Ib.*, I, 54.

[1] Only *towns* were by this act allowed to have each a supervisor; while the freeholders of every manor, liberty, jurisdiction, precinct, and out-plantation could join their votes with those of the next adjacent *town* of the county for choice of supervisor; but the manor of Rensselaerswyck was to have one of its own: Van Schaack, *Laws of N. Y.*, I, 54. Subsequently, however, nearly all inequalities were removed by special acts relating to particular places.

[2] Van Schaack, *Laws of N. Y.*, I, 56. Later, special officers for collection of the quit rents might be elected: *Ib.*, 404.

[3] Van Schaack, *Laws of N. Y.*, I, 36, 291.

The township officers are all elected by the freeholders and are nearly the same as are still chosen in town-meetings throughout the West. Besides the supervisor, assessors, collectors, surveyors of highways, and fence viewers, already mentioned; there are also a clerk, overseers of the poor, constables, pound masters, and officers to look after the estates of persons dying intestate.[1] But several of these functionaries are not instituted for all towns or other districts by general law.[2] The provincial legislation of New York is peculiar in this regard that, in every branch of local administration, special statutes for particular places are enacted, so that it is sometimes nearly impossible to say whether a given office or function exists in all cases.

Such was still the general character of township organization in 1777; and the state constitution of that year provides that all town officers hitherto chosen by the people, "shall always continue to be so eligible, in the manner directed by the present or future acts of the legislature."[3]

V.—The Manor.

The manorial system, as we have seen, flourished in New York under the Dutch as well as under the English rule. On the other hand it met with little favor among the New England colonists, who preferred compact village life and

[1] Clerks, overseers of the poor, and persons to look after estates are authorized for all towns: Van Schaack, *Laws of N. Y.*, I, 14–15, 224–5; II, 756, 576.

[2] Every town, manor, district, or precinct probably had one or more constables, but I do not find it so stated, except by implication: Van Schaack, *Laws of N. Y.*, I, 246, 359, 321; II, 689, 762. Constables were appointed by the sessions in Dutchess and Orange counties: *Ib.*, I, 246. In Albany and Tryon counties the sessions could increase the number: *Ib.*, II, 690. Overseers of chimneys are authorized for the manor of Rensselaerswyck: *Ib.*, II, 569. So also in Schenectady, Albany county: *Ib.*, I, 144.

[3] Poore, *Charters*, II, 1337.

small estates to the vast plantations and isolated homesteads so prevalent in the middle and southern provinces. The Council for New England, however, under the powers granted them in the charter of 1620, resolved to divide the country into "counties, baronies, hundreds, and the like." The baronies were to be governed by their stewards and other inferior ministers, who were to have assigned them the power of high and low justice. Furthermore the lords of counties were to have power to subdivide their districts into manors and lordships in such way "as to them should seem best giving to the lords thereof power of keeping of Courts, and leets, as is here used in England, for the determining of petty matters, arising between the lords, and the tenants, or any other."[1] This scheme of government, so far as the proposed manors were concerned, came to nothing.

The power to erect manors with courts baron and view of frankpledge was likewise bestowed upon the proprietary of Pennsylvania by the charter of 1681;[2] and under this grant, it is probable that manors exercising jurisdiction according to the English model were actually set up.[3]

By the first charter of Carolina, 1663, power is likewise conferred upon the proprietors to erect manors with courts leet, courts baron, and view of frankpledge.[4] And again in the Fundamental Constitutions of 1669—that marvelous instrument drafted by Locke for Shaftesbury—provision is made for

[1] See the *Discovery and Plantation of New England* in 2 *Mass. Hist. Coll.* IX, pp. 22–3. Cf. *History of Grants under the Great Council for New England*, by Samuel F. Haven in *Lowell Inst. Lectures*, 144.

[2] Poore, *Charters*, II, 1514.

[3] See Gould, *Local Govt. in Pa.*, in *Pennsylvania Magazine*, VI, 162, note 4. Various large estates in Pennsylvania were styled "manors;" but whether they possessed jurisdiction I am unable to say. For example Gilbert's or Douglas' manor formerly in Philadelphia, and now in Montgomery, County: *Pa. Magazine*, III, 453; *Pa. Col. Rec.*, V, 235; also the manor of Springetsbury, north of Philadelphia: *Pa. Col. Rec.*, XV, 541.

[4] Poore, *Charters*, II, 1388. A similar provision is contained in the supplementary charter of 1665: *Ib.*, 1396.

the creation of manors. The whole province is erected into a palatinate "as large and ample as the county palatine of Durham," with the senior proprietor as count. The entire jurisdiction is to be divided into counties; and every county into eight seignories, eight baronies, and twenty-four colonies, the latter arranged in four precincts. Each seignory, barony, and colony respectively is to comprise twelve thousand acres. The seignories are to belong to the proprietors, the baronies to the inferior nobility, and the colonies to the common freemen. For each county the proprietors are to appoint one landgrave and two caziques, who are to constitute an hereditary nobility. To each langrave four baronies, and to each cazique two baronies, are to be assigned. Manors also may be erected, each of which shall contain not less than three thousand acres. The lord of every seignory, barony, or manor may have a court leet with criminal and civil jurisdiction; and very considerate provision is likewise made for a class of praedial serfs or "leetmen," whose status shall be hereditary, though just how this feature of the constitution is to be realized does not clearly appear. But we have here to do, not with a living organism, but with the impracticable ideal of a philosopher. "For all practical purposes Locke's constitution, with its elaborate details and minute provisions, might as well have never existed. In dealing with it, we are discussing, not an integral portion of the history of Carolina, but rather a peculiar episode in the history of political thought."[1]

But it is in Maryland that manorial institutions attained their fullest development in this country. The charter of 1632 granted to Lord Baltimore and his heirs license "to erect any parcels of land within the province aforesaid, into manors, and in every of those manors, to have and to hold a court baron, and all things which to a court baron do belong; and to have

[1] Doyle, *English Colonies*, I, 335; Bancroft, *Hist. of U. S.*, I, 412 ff.; Hildreth, *Hist. of U. S.*, II, 30 ff.; Poore, *Charters*, II, 1397; *North Carolina Col. Records*, I, 187 ff.; Hawks, *Hist. of N. C.*, II, 182 ff.

and to keep view of frankpledge, for the conservation of the peace and better government of those parts, by themselves and their stewards," or others properly deputed.[1] In consequence of this license, in 1636 the proprietary included in his "conditions of plantations" addressed to Governor Leonard Calvert, the following order:—

"And We Doe further will and authorize you that every 2000 acres, and every 3000 acres, and every 1000 acres of Land So to be passed or Granted as afores[d] unto any Adventuror or Adventurors, be erected and created into a Manor to be called by such name as the Adventuror or Adventurors shall desire, And We Doe hereby further authorize you, that you cause to be Granted unto every of the Said Adventurors within every of their Said Manors . . . a Court Baron and Court Leet. . . . And to the end you may better be Informed in what manner to pass every Such Grant, Court and Courts as aforesaid, according to our Intention, We have Sent unto you under our hand and Seal, a draught of a Grant of a Manor Court Leet, and Court Baron, and a Grant of a ffreehold, w[ch] presidents you are to follow changing only the Adventurors names, the Rents and Conditions of Plantacon as the Case Shall require."[2]

These instructions were repeated, with various modifications, from time to time.[3] For example, in 1648, the proprietary required that:

"The sixth part of the Land of every Mannor which shall be Granted by Virtue of the said Conditions [transporting into the province twenty persons in any one year] shall be for ever after Accompted and known for the demesnes of Every of the said Mannors respectively which demesnes shall be set

[1] See translation of charter in Bozman, II, 19; or original Latin version in Poore's *Charters*, I, 816; and *Archives of Md., Council Proceedings*, p. 11.

[2] *Archives of Md., Council Proceedings*, p. 48.

[3] See for example *Archives of Md., Council Proceedings*, pp. 100, 224, 231, 233, 458.

forth in some one Convenient place altogether within every such mannor by distinct meetes and Bounds for that Purpose, and shall never be Alienated separated or leased from the Royalties and Lord of Lords of the said Respective Mannors . . . for the time being for any number of years or other term exceeding seven years."[1]

Again, in 1651, certain Indians belonging to six different tribes desiring that a tract of land called Chaptico, comprising eight or ten thousand acres, should be set apart as a joint reservation for them, the proprietary resolved upon the curious experiment of erecting a manor for their benefit. It was to be styled Colverton (Calverton) manor, and have courts leet and baron to be held by the lord's steward. One thousand acres were to be set apart as lord's demesnes; the remainder was to be parcelled out by the steward to such Indians as should desire the same, to be held by copy of court roll for one, two, or three lives. No copyholder was to receive more than fifty acres, except the "werrowance or chief head of every of the said six nations," who was to have not to exceed two hundred acres.[2] This expedient, by which his lordship hoped to bring the Indians not only to "civility but also to christianity," will remind the reader of the Indian tithings of Plymouth.

Many manors were erected in Maryland; and their organization seems to have corresponded, even in minor details, to the contemporary manorial constitution in the mother country. They were self-governing local bodies, the free tenants being still judges, jurors, and affeerers for determining their own causes.[3] Indeed the manorial organization of Maryland, supplemented by that of the hundred—which also during the

[1] *Archives of Md., Council Proceedings*, 224.

[2] *Archives of Md., Assembly Proceedings*, 329–31.

[3] For details see the valuable monograph of Mr. J. Johnson entitled: *Old Maryland Manors*, in *J. H. U. Studies*, I, No. VII, to which is appended the "Records of the court leet and court baron of St. Clement's manor, 1659–1672." Cf. Browne, *Maryland*, 37, 64, 176–8.

early period attained a singular development in this province,[1] supplied a partial equivalent for the local self-government enjoyed by the New England colonies.

VI.—The Virginia Parish.

(*a*).—*Genesis of the Organization.*

When the colonization of America began in the seventeenth century, the primary local body in the mother country was styled the parish. This was a two-fold organization: ecclesiastical on its one side; temporal on the other. But the ecclesiastical name, παροικια, neighborhood, had superseded in common use the *town* or *tun* of more ancient times. Furthermore, during the Stuart reigns, the parish, like the borough, was fast losing its original democratic character: falling, in many places, into the hands of a self-perpetuating board—the select vestry; while in others the people, in open meeting assembled, still exercised supreme control of their own affairs. If we now turn to the new world we observe a most interesting process of institutional "selection" or adaptation under influence of diverse social or physical environment. In New England the temporal character of the local organization overshadows the spiritual; *town* or *township* supersedes *parish* as its popular and legal designation, the use of the latter name being almost entirely restricted to the community as a body of fellow worshippers. In New York there is a nearer approximation to the contemporary English model. The dual character of the primary body is clearly recognized in the Duke's Laws: civilly it is a town; ecclesiastically, a parish. The duties of constable or overseers as officers of the town are clearly distinguished from those of constable, overseers, or churchwardens, as officers of the parish. But in both aspects they are responsible functionaries periodically chosen by the people or their agents.

[1] See below Chap. V, IV, (*b*).

But it is in Virginia, which in many respects may be regarded as the type of the southern colonies, that we find the most complete reproduction of the contemporary English parish. Following is a brief outline of its history and organization.[1]

The word parish as the name of a representative division first appears in Hening's Statutes under date of 1631–2, when the upper and lower parishes of "Elizabeth Citty" are mentioned as returning burgesses to the assembly.[2] But the earlier "plantations" and "hundreds"—as the first local districts in Virginia were called—were doubtless *de facto* parishes. Thus the very first clause of the enactments of the assembly of 1623–4 provides: "That there shall be in every plantation, where the people use to meete for the worship of God, a house or roome sequestered for that purpose, and not to be for any temporal use whatsoever, and a place empaled in, sequestered only to the buryal of the dead."[3] And later in the same enactments the word "parish" seems to be used instead of "plantation." It is required that every "parish" shall have a public granary to which every planter of eighteen years and upwards shall bring a bushel of corn to be disposed of "for the publique use of the parish by the major part of the freemen;" and "three sufficient men of every parish shall be sworne to see that every man shall plant and tende sufficient of corne for his family," those failing therein to be reported to the governor and council.[4] Churchwardens of plantations[5] and hundreds[6] are mentioned; and by the celebrated assembly of

[1] I have only attempted a summary. For more detailed accounts see the monographs of Dr. Channing and Mr. Ingle in the second and third series of the *J. H. U. Studies.*

[2] Hening, I, 154.

[3] Hening, I, 122.

[4] Hening, I, 125–6.

[5] Hening, I, 126 (1623–4).

[6] Hening, I, 145 note (1627). Cf. Dr. Channing, *Town and County Government,* 43.

1619 the minister and churchwardens are required to make presentment of "all ungodly disorders."[1] Thus it would seem that the earliest local divisions of Virginia were dual organizations and denominated indifferently plantation, hundred, or parish. Subsequently many of the counties were regularly subdivided into parishes.[2]

(*b*).—*The Vestry.*

Chief authority in the parish was exercised by the vestry, a body composed usually of twelve[3] of the "most sufficient and selected men" in the community.[4] In the early period the vestrymen, like the analogous selectmen of the New England towns, were chosen "by the major part" of the parishioners;[5] but later they obtained the power of filling

[1] *Col. Rec. of Va.*, 27. Chalmers, *Political Annals*, I, 50, says: "The eleven hundreds, into which the colony had been divided, were now—May, 1620—erected into so many parishes."

[2] So in 1655 and again in 1657–8 the assembly ordered that all counties, not yet laid out in parishes should be so subdivided: Hening, I, 400, 478. But when the population was small, an entire county sometimes constituted but a single parish. Thus, in 1642–3 Northhampton county, on account of its great extent, and the "inconvenience for the inhabitants to be all of one parish," was divided into two parishes: Hening, I, 249. In the same year Upper Norfolk county was divided into three parishes: *Ib.*, I, 250; also Isle of Wight county, into two: *Ib.*, I, 278. For other examples see *Ib.*, IV, 366, 367, 368. In 1680 there were 20 counties; of these 11 were each divided into two parishes; and 2 constituted each but one: see the certified list in *Colonial Records of Va.*, 103–4. Even in 1781 Thomas Jefferson writes: "The state, by another division, is formed into parishes, many of which are commensurate with the counties; but sometimes a county comprehends more than one parish, and sometimes a parish more than one county." *Notes on Va.*, 148. At this time there were 74 counties in the state. See also *An Account of Va.* (ca. 1696–8) in 1 *Mass. Hist. Coll.*, V, 162.

[3] Hening, II, 25 (1660–1). 44 (1661–2); Beverley, 211; *An Account of Va.* in 1 *Mass. Hist. Coll.*, V, 162.

[4] Hening, I, 240.

[5] Hening, I, 290 (1644–5).

vacancies in their own number, and thus became a close corporation on the English model.[1]

Among the principal duties of the vestry were the apportionment of the parish rate;[2] the appointment of churchwardens;[3] the presentment of ministers for induction by the governor;[4] and the providing of a "glebe" and a "mansion house" for the parson at the expense of the parish.[5] The vestry and churchwardens discharged also the functions of overseers of the poor;[6] and it was their duty to provide for the "processioning" of private lands. For the latter purpose they were required, every four years, under direction of the county court, to divide the parish "into soe many precincts as they shall think necessary for the neighbors to joyne and see each others markes renewed;"[7] and to lead the "procession," in each precinct they appointed two "intelligent honest freeholders."[8] In this primitive expedient for recording boundaries of private estates, we recognize at once, in a new form, the familiar "perambulations" of both Old and New England.

As elsewhere the minister was in dignity the first officer

[1] In 1661–2 vacancies were to be filled by the minister and vestry: Hening, II, 45. According to Bacon's Laws vestrymen were to be chosen by the majority of the "freeholders and freemen" every three years: Hening, II, 356. In 1708 the vestry of Charles parish in York county were elected by the freeholders and householders "payin Seatt and Lett in the parish." See Palmer, *Cal. of Va. State Papers*, I, 122. But in 1781 vacancies were filled by co-optation: Jefferson, *Notes on Va.*, 183; *An Account of Va.* in 1 *Mass. Hist. Coll.*, V, 162.

[2] Hening, IV, 205.

[3] Beverley, 211; Hening, I, 155, 180, 240. "The vestry met at least twice a year at the church, vestry-house, or convenient private dwelling. At the Easter meeting church-wardens were appointed and the accounts of the preceding year examined. The meeting in the fall was for the purpose of apportioning the annual levy." Ingle, 63.

[4] Hening, VI, 90; Beverley, 211.

[5] Hening, IV, 206; III, 152; II, 30, 45, etc. The glebe comprised usually, at least 200 acres. See Ingle, 32–5, for an interesting account.

[6] Hening, II, 267; IV, 210–12; VI, 519, etc.; Ingle, 64, 65.

[7] Hening, II, 102.

[8] Hening, V, 427.

of the parish. It was his privilege to preside in all vestry meetings;[1] and, besides his ordinary spiritual duties, he could join persons in marriage, and was required by law, sometimes co-ordinately with the churchwardens, reader, or clerk of the parish or vestry, to keep a register of "burialls, christenings, and marriages."[2] The minister's salary, like all public charges, was paid in tobacco. In 1696 it was fixed by the legislature at sixteen thousand pounds a year "besides their lawful perquisites," and this law remained in force until the Revolution.[3] But in practice the vestry "hired"[4] their minister from year to year, reducing his salary to a lower sum; and this was a source of some dissatisfaction. Beverley, writing in the beginning of the eighteenth century, says: "The only thing I have heard the clergy complain of there, is what they call precariousness in their livings; that is, that they have not inductions generally, and therefore are not entitled to a freehold; but are liable, without trial or crime alledged, to be put out by the vestry. And though some have prevailed with their vestries, to present them for induction, yet the greater number of the ministers have no induction, but are entertained by agreement with their vestries, yet are they very rarely turned out without some great provocation, and then,

[1] Beverley, 211.

[2] Hening, I, 155, 158, 180, 433. In 1659–60 it was enacted that a register should be appointed by the parish, who should report to the clerk of the county court: Hening, I, 542; and in 1661–2 the duty was imposed upon the "minister or reader of every parish:" Hening, II, 54. Cf. Ib. III, 153; IV, 42–5; and particularly the dispute in Manican Town Parish in Palmer, *Cal. of Va. State Papers*, I, 114–16, where the minister required the "Register of Christenings to be delivered up to him out of y^e^ Clerk of the Vestry's hands, & in case he refused to do it, he would excommunicate him."

[3] Hening, III, 152 and note.

[4] "The power of presenting ministers is in them, by the law of that country; but the law in this point is little taken notice of, by reason of a contrary custom of making annual agreements with the ministers, which they call by a coarse enough name, *hiring* of the minister, so that they seldom present any ministers, that they may by that means keep them in more subjection and dependence": *An Account of Va.* in 1 *Mass. Hist. Coll.*, V, 162.

if they have not been abominably scandalous, they immediately get other parishes, for there is no benefice whatsoever in that country that remains without a minister if they can get one, and no qualified minister ever yet returned from that country for want of preferment."[1] On the other hand considerable exasperation was caused by the unwise policy of the government in trying to force its own nominees into livings against the will of the vestry; and, in the two-fold struggle on the part of the vestries for the right to choose and pay their own ministers, a spirit of resistance to aggression and a feeling of self-reliance were fostered which were of infinite value when the hour of revolution came.

On the whole, the Virginia vestries, though aristocratic in form, seem to have administered the local affairs with wisdom and moderation; and, though not chosen by the parishioners, they appear to have been sustained by popular sentiment which finds expression in the words of Thomas Jefferson: "These—the vestrymen—are usually the most discreet farmers, so distributed through the parish, that every part of it may be under the immediate eye of some one of them. They are well acquainted with the details and economy of private life, and they find sufficient inducements to execute their charge well, in their philanthropy, in the approbation of their neighbors, and the distinction which that gives them."[2]

(*c*)—*Officers of the Parish.*

The two churchwardens were the executive agents of the vestry, chosen annually from their own number by that body; but in case of failure to appoint on the part of the vestry, they

[1] Beverley, 213. An interesting illustration of bargaining for the minister's salary may be found in the complaint of the vestry of St. John's parish in "Kinge and Queene Countye" against Rev. Mr. Monro: Palmer, *Cal. of Va. State Papers*, I, 49. See also the dispute as to whether a minister not "inducted" could claim a "peculiar right" or title to a glebe: *Ib.*, pp. 49–50.

[2] *Notes on Va.*, 183; see also Lodge, *Short History*, 59.

were nominated by the county court, sometimes together with "sidesmen" or assistants.[1] The churchwardens were the fiscal officers of the parish, collecting[2] and disbursing the levies for the support of the minister and the church.[3] Besides this and various other duties, they were here as elsewhere, expected to watch over the morals of the community; being required to make presentments to the county court for drunkenness, swearing, fornication, and other offences; and this function they exercised, in some cases, co-ordinately with the grand jury.[4]

Other officers of the parish were the sexton and the clerk who were appointed by the incumbent or by the vestry.[5] "The duties of the clerk who assisted the minister," says Mr. Ingle, "were multifarious. In the absence of the rector he could perform all the offices of the church, except matrimony and the two sacraments, he sometimes published banns, catechised the children and ignorant persons, kept a record of all births, marriages, and deaths, sometimes acted as clerk of the vestry and collector of the parish levies, and saw that all leaves and other rubbish were cleared away from the church yard."[6]

(*d*).—*The Parish as a Unit of Self-Government and Representation.*

Thus it appears, from the foregoing, that numerous important functions of a civil township were discharged by the Virginia parish. Nevertheless it was overshadowed by the county organization which was employed not only for the higher offices of local self-government, but as the unit of

[1] Ingle, 94.

[2] But special collectors were sometimes appointed, or the parish clerk might be entrusted with the duty.

[3] Beverley, 212; Hening, I, 160, 185, 241, etc.

[4] Hening, IV, 245; I, 240, 309, 310, etc. Cf. Channing, 49; Ingle, 66–7.

[5] Hening, I, 241, 226. Palmer, *Cal of Va. State Papers*, I, 114–16, mentions a "vestry" clerk.

[6] *Local Inst. of Va.: Studies*, III, 163–4.

representation and administration as well. However it is interesting to note that even for the latter purposes the parish was actually used. Originally, as already shown, burgesses sat for parishes as well as for plantations and hundreds; and, even after the county became the area of representation, parishes were allowed to choose burgesses for special purposes;[1] but whether this privilege was taken advantage of is uncertain.[2] More interesting, however, from an institutional point of view, was the act of 1662, allowing both parishes and counties to enact by-laws for their own government "to be binding upon them as fully as any other act."[3] But this arrangement seems to have been unsatisfactory; so, in 1679, it was enacted instead, that "two men should be elected by the parishioners of each parish, who should sit in the county court and have equal votes with the several justices in the making by-laws."[4] Whether this measure was ever carried into effect may be doubted; but it is nevertheless remarkable as an attempt to establish in Virginia the ancient representation of the township by the "reeve and four" in the county court.[5]

VII.—The Parish in Maryland and the Carolinas.

(*a*).—*The Maryland Parish.*

Elsewhere in the Southern Colonies the parish was introduced; and, while the Virginia institution may have served

[1] Thus in 1642–3 Lynhaven and Upper Norfolk parishes were allowed to choose burgesses, probably for "their perticular occasion," as expressed in an act of Dec., 1656. See Hening, I, 250, 277, 421, for these three acts.

[2] Cf. Channing, 53, who cites these passages, apparently to prove that an attempt was made to substitute the parish for the county as the basis of representation; but this is scarcely probable, though the statutes are not clear.

[3] Hening, II, 171.

[4] Hening, II, 441.

[5] On the ecclesiastical history of Virginia see Bishop Meade's *Old Churches, Ministers, and Families of Virginia;* and for illustrations of general parish history, consult Slaughter's *Bristol Parish* and his *St. Mark's Parish.*

as a general model, there were several interesting and important variations in constitutional organism which require notice.

In 1692 the Protestant Episcopal Church was first established by law in Maryland.[1] The act provides that the justices of each county shall meet at the court house, "giving notice to the principal free-holders to attend them"; and when assembled, they are required, "with the advice of said principal free-holders," to divide the county into parishes and cause the same to be laid out by metes and bounds. The powers and duties of the vestry and officers are also defined.[2]

The law of 1692 was repealed in 1696, but all its essential features were restored by an act of 1702, which remained in force, with slight modification, throughout the colonial era.[3] By this act an annual tax of forty pounds of tobacco for the support of the minister is laid upon each taxable person in every parish; but the minister is required to appoint a "clerk of the parish church" and pay him from the proceeds of the tax a salary of one thousand pounds of tobacco a year.

Chief authority in the parish is exercised by a "select vestry" composed of six members besides the incumbent who is constituted "principal" of the body. But it is worthy of note that the vestry of Maryland bears a closer resemblance to the New England selectmen than to the select vestry of Virginia.

[1] For a detailed treatment of the Maryland parish see Mr. Ingle's monograph, *Parish Institutions of Maryland, J. H. U. Studies*, I, to which are appended extracts from the original records of several parishes.

[2] Bacon, *Laws of Md.*, 1692, c. II. Cf. Browne, *Maryland*, 185, 189–91.

"At first the parishes were contained within the limits of the county; but later, as the number of counties and parishes increased, some parishes lay in parts of two and even three counties. The hundreds were not of necessity integral parts of the parish, although they were made the basis of the new division.... As population became denser, the number of hundreds in the *county*, without regard to parish bounds, became greater, so that frequently one hundred was in two parishes": Ingle, *Parish Inst. of Md.*, 6.

[3] For this elaborate statute see Bacon, *Laws of Md.*, 1702, c. I.

The latter is a close corporation; the former, a responsible board periodically chosen by the assembled freeholders.[1]

The remaining officers are the two churchwardens and the clerk or register of the vestry. The churchwardens are elected annually by the freeholders and perform the usual civil and constabular functions.[2] The vestry clerk is chosen by the vestry; and, in addition to his ordinary secretarial duties, he is required to record all births, marriages, and burials occurring within the parish.

The churchwardens and vestry are expected to maintain the fabric and see that all parochial charges are paid; and in case the revenue accruing from fines, mulcts, or other sources are not sufficient for the purpose, they may apply to the county court, which is empowered to levy a tax therefor of not to exceed ten pounds of tobacco on the poll.

The parish of Maryland was employed chiefly as an ecclesiastical organization; but it was not wholly devoid of temporal powers. By the vestry and churchwardens, for example, tobacco inspectors were appointed; and to them likewise were entrusted certain other duties connected with the execution of the tobacco laws.[3] But in this province the Established Church

[1] On Easter Monday annually two vestrymen retired and two new members were elected in their place: Bacon, *Laws of Md.*, 1702, c. I, § 8.

[2] Any churchwarden, vestryman, or minister could impose the prescribed fines on any person for cursing or being drunk in his presence; or in default of payment of the fine, commit the offender—"not being a freeholder or other reputable person"—to the stocks for not to exceed three hours, or cause him to be publicly whipped by any person, not lawfully exempt, appointed for the purpose. But no person for any one offence was to receive more than thirty-nine lashes: Bacon, *Laws of Md.*, 1723, c. XVI. These officers were also given a general censorship of morals. Persons were summoned before the vestry for sabbath breaking, or for adultery; or they might receive public admonition by the minister. Public confession of moral delinquencies was sometimes made at the communion table: Ingle, *Parish Inst. of Md.*, 20–1.

[3] Bacon, *Laws of Md.*, 1763, c. XVIII. They were authorized to arrest persons for transporting or "running trash tobacco" out of the province: *Ib.*, 1722, c. XVI; 1763, c. XVIII.

was weak, and the parish was of comparatively little significance as a means of local government.

(*b*).—*The South Carolina Parish.*

The act of 1704 for establishing the Church of England in South Carolina is very different in many of its provisions from the law of Maryland passed two years before.[1] Berkeley county is divided into six parishes, and the "parish of St. Philip's in Charlestown" is separately constituted. The vestry consists of the rector and nine vestrymen. The latter and the two churchwardens, as in Maryland, are elected annually by the freeholders on Easter Monday. The vestry clerk is chosen each year by the vestry; but the parish clerk and the sexton are appointed by the same body for life or during good behavior. Moreover it is noteworthy that the rector, in the first instance, is elected "by the major part of the inhabitants" of the parish "that are of the religion of the Church of England . . . , and that are settled freeholders within the same, or that contribute to the publick taxes." Vacancies are filled in the same manner; and the incumbent may be removed, by the ecclesiastical commissioners of the province, whenever they are petitioned so to do by a majority of the vestrymen and nine other freeholders. The vestry and churchwardens are authorized to levy a tax for the payment of parish charges, and they may appoint three persons to make the assessment. Appeal from the assessment lies to the provincial commissioners; and the tax is collected by the constable on a justice's warrant.

By subsequent enactments the constitution of the parish was modified or developed in various ways. Thus in 1706[2] the number of vestrymen was reduced to seven; the number of parishes increased to ten; the amount of the annual levy

[1] *South Carolina Statutes at Large*, II, 236 ff. The act is also printed in *N. C. Col. Rec.*, II, 867–82.

[2] *South Carolina Statutes at Large*, II, 283 ff.

restricted to one hundred pounds; the salary of the minister in ordinary parishes fixed at fifty pounds; and the province commissioners were authorized to receive charitable gifts for the benefit of any parish.

But it should be particularly noted that the South Carolina parish gradually became the political and constitutional unit. Nominally it was a subdivision of the county. But the county seems to have been little more than a territorial designation; while the parish was the centre of an active and remarkably independent self-government. It was constituted the basis of representation in the assembly, and the churchwardens were made ex officio "managers" of the elections.[1] It was also the district of the constable who was nominated by the court of general sessions;[2] and it was entrusted with the care of the poor, the overseers being appointed by the vestry and churchwardens.[3] The parish was also a highway district, and had its own road commissioners, either elected by the freeholders or appointed by the assembly.[4] Other powers were bestowed upon particular parishes by special enactment. Thus in 1736 the parish of St. Thomas was authorized to elect a treasurer, an usher, a schoolmaster, and a clerk.[5]

In the "up" or "back" country the parish system was not introduced. There "districts" for the holding of courts and the appointment of judicial and peace officers were the only form of organization; but in the low country along the coast, the parish remained the political unit until the civil war.[6]

[1] *South Carolina Statutes at Large*, II, 684–5 (1716).

[2] *South Carolina Statutes at Large*, III, 555.

[3] *South Carolina Statutes at Large*, II, 594–7; IV, 9, 407.

[4] Ramage, *Local Government in South Carolina*, 12; *South Carolina Statutes at Large*, IV, 9–10, 301, 408; IX, 49, 144–5, etc.

[5] *South Carolina Statutes at Large*, III, 434–5.

[6] See Ramage, *Local Government and Free Schools in South Carolina*, in *J. H. U. Studies*, I; also Chap. IV, I, (*b*), below. On the ecclesiastical history of the colony, see Ramsay, *Hist. of South Carolina*, II, 3 ff.; Simms, *Hist. of South Carolina*, 112 ff.

(c).—*North Carolina Precincts and Parishes.*

The history of local government in North Carolina begins with the Fundamental Constitutions of Locke drafted in 1669. In accordance with a provision of this instrument, the county of Albemarle—that is to say, all of North Carolina originally organized or settled—was divided into four "precincts." Bath county on the Pamlico was subsequently created;[1] and here and elsewhere precincts were gradually formed.[2] So the precinct was the first civil organization instituted in the province. It was practically a shire invested with judicial and other administrative functions: for the counties so-called, of which the precincts were subdivisions, were merely territorial circumscriptions seemingly without organic significance, unless as the basis of certain empty titles.[3] And in 1738, nine years after the extinction of the proprietary government, the fourteen precincts then existing were styled *counties;* and the earlier designation, after having been employed for nearly seventy years, passes out of use.[4]

Furthermore, it is not without interest to note incidentally, that this institution represents the only provision of the "grand model" which ever gained any practical significance.[5] Each precinct had its court held by at least three of the eight justices of the peace.[6] The court possessed a limited criminal

[1] Probably in 1697; *North Carolina Col. Rec.*, III, 574.

[2] A fifth precinct in Albemarle county was formed in 1722 by subdivision of Chowan. This was called Bertie. For an account of the formation of the various precincts, with the dates, see *North Carolina Col. Rec.*, III, 574–5; and consult the map in Hawks, *Hist. of North Carolina*, II, 570.

[3] It was the intention of the framers of the Fundamental Constitutions that each county should be a separate "government."

[4] The change seems to have been made in 1739 or 1738: *N. C. Col. Rec.*, IV, 345–7, 330. See the boundaries of counties defined, etc., *Ib.*, 484–5, 493, 733, 887–8.

[5] See *N. C. Col. Rec.*, III, 442 ff., where the origin of precincts is discussed.

[6] See the form of justices' commission in *N. C. Col. Rec.*, I, 574–5 (1703). Cf. *Ib.* IV, 47.

and civil jurisdiction; could take probate of wills; and appoint guardians for orphans or bind them as apprentices. It might also "grant administration on estates; but all letters testamentary or letters of administration were signed by the governor and secretary of the province, with the colony seal annexed."[1] In the early period the processes of the court were served by a "provost marshal," but subsequently the title of the office was changed to sheriff.[2] Every court had its clerk and could appoint constables[3] and highway overseers.[4] And, finally, the precinct was recognized as the political unit, each being entitled to representation in the assembly.[5]

The Church of England was first established in North Carolina by an act of the assembly in 1701. By this statute each precinct was constituted a parish and the powers of the vestry were defined. But the act remained valid only until 1703 when it was returned by the proprietors without their approval. Between this date, therefore, and 1715, when a new law relating to the Establishment appeared, the Church of the province was strictly without legal foundation.[6] Nevertheless during the entire period the act of 1701 seems to have been observed, at least by the Episcopalians, though its passage had

[1] Hawks, *Hist. of North Carolina*, II, 198–9.

[2] *N. C. Col. Rec.*, IV, 347, 393; Hawks, *Hist. of N. C.*, II, 196.

[3] *N. C. Col. Rec.*, I, 548. There was also a precinct treasurer: *Ib.*, III, 582.

[4] *N. C. Col. Rec.*, I, 535, 550, 607, 618.

[5] *N. C. Col. Rec.*, III, 207. Gov. Burrington claimed the right, on the advice of the council, of creating new precincts by subdivision. And this claim, since it involved a control of representation, led to remonstrance on the part of certain councillors: *N. C. Col. Rec.*, III, 439 ff., 380. The incident recalls the "New Counties Controversy" between Gov. St. Clair and the assembly of the Northwest Territory.

Portions of the original records of the court of Perquimans precinct, beginning in 1693, are published in the *North Carolina Colonial Records*, and they constitute not the least interesting part of that exceedingly valuable collection.

[6] See Hawks, *Hist. of N. C.*, II, 169, 341, 357–8. But a law relating to vestries was enacted in 1710: *N. C. Col. Rec.*, II, 10.

been strenuously opposed by the Quakers and other sectaries.[1] Indeed so far as the parish constitution is concerned, the original records of the vestry of St. Paul's parish, Chowan precinct, extending from June, 1702, to 1715—comprised in the recently printed Colonial Records of North Carolina—enable us to see it in actual operation.

The meetings are usually attended by eight or nine vestrymen, one of whom is styled "president;" for it seems that the vestry refused to allow the minister to preside.[2]

The entire authority of the parish appears to be centralized in the hands of the vestry. Vacancies in their own number are filled by co-optation.[3] The two churchwardens,[4] and the clerk,[5] are nominated by them. They exercise the right of taxation and appoint collectors of the levy;[6] erect church buildings and keep them in repair;[7] procure a standard of

[1] Hawks, *Hist. of N. C.*, II, 303, 341.

But it appears that dissenters were taxed for support of the church: "Also the Meeting's judgment is that all Friends that do suffer on Truth Ac^{t} Either for not bearing arms or Refusing to pay Parish levies towards the support of the Churches so called do keep a true ac^{t} of the sum they suffer & the day distress is made and Render the same to either John Symons or Joseph Gloster": From the Records of the Friends' Monthly Meeting in Pasquotank Precinct, June, 1713: *N. C. Col. Rec.*, II, 37.

[2] See the complaint of Mr. Urmstone, *N. C. Col. Rec.*, I, 771 (1711): "Our blessed Vestrymen who are to establish the Church, in Order thereto at the first strike at one of the fundamentals of our constitution in understanding the Act of Vestry otherwise than it was intended in a former Act which the Society did not allow . . . it was said expressly that the Minister should always be deemed a Vestryman which is highly necessary here where they are so great strangers to the business of a Vestry being to amend that act by abolishing that power of meeting annually to hire their Minister for the year ensuing they have omitted that for the Minister being a Vestryman whereupon many will have it that the Minister hath nothing to do in Vestry which is contrary to our Establishment in England."

[3] *N. C. Col. Rec.*, I, 678, etc.

[4] *N. C. Col. Rec.*, I, 561, 596, 680, etc.

[5] *N. C. Col. Rec.*, I, 702; II, 11. The offices of clerk and reader were sometimes combined: *Ib.*, I, 597, 684.

[6] *N. C. Col. Rec.*, I, 558–61, 829; II, 11.

[7] *N. C. Col. Rec.*, I, 560, 597, etc.

weights and measures;[1] purchase glebes;[2] audit the churchwardens' accounts;[3] and relieve the sick and the poor.[4]

As in Virginia the vestry insisted on the right of "hiring" their minister from year to year, though occasionally the approbation of the governor was obtained.[5] This, of course, sometimes led to abuse and was the cause of bitter complaint on the part of the missionaries sent out by the recently organized Society for the Propagation of the Gospel in Foreign Parts.[6] Salaries were very small, hard to collect, and sometimes rendered in depreciated currency or in produce at exorbitant prices.[7] Indeed the act of 1701 was rejected solely

[1] *N. C. Col. Rec.*, I, 558, 568–9.

[2] *N. C. Col. Rec.*, I, 680–1, etc.

[3] *N. C. Col. Rec.*, I, 678, 702, etc.

[4] *N. C. Col. Rec.*, I, 569, 600, 678, etc.

[5] *N. C. Col. Rec.*, I, 597, 684.

[6] Thus Mr. Urmstone—who, of course, is a chronic grumbler—writes in 1716/17:

"The governor would concur with me in appoint^{ng} a new Vestry, but our Vestrymen (that should be) say I am not incumbent, because forsooth not hired by them and his Honor's appointment will not signify anything, he has offered to induct me in order to entitle me to Salary allowed by this late act but all in vain for it will never be paid": *N. C. Col. Rec.*, II, 271. Similar complaints are made before as well as after the act of 1715. See *Ib.*, II, 127–8, 130–2, 294–5; IV, 12, 606–7; also the letter of Gov. Glover to the Bishop of London, Sept. 25, 1708: Hawks, *Hist. of N. C.*, II, 357–8.

[7] "For two years and upwards I have been endeavouring to recover by course of law my first years Salary which was £161. Currency that is £16.2. sterling, But have not been able to obtain Judgment & when I do they can Pay me with less than the third part of the real value by over rating Commodities which the Law obliges us to take in Payment. This years Salary they have paid in Rice . . . at six shillings three pence sterling P^{r} Hundred and it sells in Charles Town for very little above two Sh^{s} St^{g}. Besides the misfortune here is Tho' I were willing to sell it at One S^{h} Ster^{g} p^{r} Hundred there is no Merchant to buy it No Vessel to carry it off and should it be all summer in this hot Climate as possibly it must, I do not know if it will be worth anything in the Fall," etc. Letter of Rev. James Moir to the Secretary of the Society, March 26, 1745: *N. C. Col. Rec.*, IV, 754. See the letter of Rev. Clement Hall: *Ib.*, 752–3; and that of Urmstone: *Ib.*, II, 218–20; III, 180.

because it fixed the annual stipend at thirty pounds a year, which was deemed inadequate.[1]

The law of 1715[2] introduced few important changes in the existing constitution of the parish. Several of the precincts were divided each into two parishes; and select vestries were instituted to consist of the incumbent and twelve vestrymen. But substantially the same powers were given them as the vestries had always possessed.

The colonial church of North Carolina appears to have been a feeble body. The members were few, generally poor, and often lukewarm; while the Quakers, Presbyterians, and other dissenters were numerous and antagonistic. The life of the missionary was one of toil and privation. Parishes were of vast extent,[3] and on account of the numerous broad streams, travel was attended by unusual difficulties. Few persons could be induced to undertake the hardships of missionary life; and sometimes not a single settled parson was to be found in the entire province.[4] Among the ministers sent out by the Society some were, of course, estimable men;[5] but a

[1] Hawks, *Hist. of N. C.*, II, 357.

[2] The act is printed in *N. C. Col. Rec.*, II, 207–13.

[3] The following statement, though contained in a letter of the notorious Boyd, is probably in the main truthful:

"The parish I live in is of a vast extent being upwards of 100 miles in length & 50 in breadth I preached in 7 different places which obliges me to ride every month 260 miles . . . We are very happy in having no different sects or opinions in this part of the Country (in North West Parish) but I have great reason to complain of a Laodecean luke warmness immorality but lower down in the County there are a great many Quakers and Anabaptists," etc.: *N. C. Col. Rec.*, IV, 7 (1735). See further *Ib.*, IV, 753–4; II, 118–19, 531.

[4] Thus Gov. Burrington states that in 1731 there is not a settled parson in the country: *N. C. Col. Rec.*, III, 180. Later in 1731/32 he says there are but two ministers of the Church of England in the province: *Ib.*, 339; and again in 1732 he says there is not one; *Ib.*, 429. So in 1721, after Urmstone's departure, there was no minister left: *Ib.*, II, 430; and the same is true for 1710, after the departure of Mr. Adams: Hawks, *Hist. of N. C.*, II, 350.

[5] For an account of the principal ministers of the colonial period see Hawks, *Hist. of N. C.*, II, 342 ff.

few were of unsavory reputation, rivalling the cock-fighting parsons of Virginia for vice and dissipation. To this latter class belonged the Rev. Daniel Brett, the first Episcopal clergyman who came to the colony;[1] and the Rev. John Boyd, notorious for open drunkenness.[2] On the other hand, if we may trust Mr. Urmstone, whose querulous statements must usually be taken with a grain of allowance, some of the vestries in moral conduct were anything but models of propriety.[3]

[1] Hawks, *Hist. of N. C.*, II, 341. But Brett was not sent by the Society.

[2] *N. C. Col. Rec.*, IV, 264.

[3] In 1711 he says of one of the vestries: "They were very much disordered with drink they quarrelled and could scarce be kept from fighting. . . . The Vestry met at an ordinary where rum was the chief of their business, they were most of 'em hot headed very averse to go upon business": *N. C. Col. Rec.*, I, 769. Cf. *Ib.*, II, 131.

CHAPTER IV.

RISE OF THE TOWNSHIP IN THE WESTERN STATES.[1]

I.—Evolution of the Township-County System.

(*a*).—*The Fundamental Ordinances of 1785 and 1787.*

It is customary to describe the remarkable system of local government prevailing in the Western States as the "compromise plan." The name is not entirely inapposite, if two important historic facts are kept in mind. First the "compromise"—that is to say, the co-operation of town and county in the work of local administration—was really begun in the colonies long before the Revolution. Secondly, that compromise consisted essentially in restoring the primitive local constitution. For ages before and for ages after the Norman Conquest the work of local government was shared not only by the county and township but by the hundred as well; and the meeting of the supervisors to form the county board—the characteristic feature of the highest type of western organization—is but a revival of ancient representation through the reeve and four from each tunscipe of the shire.

Nevertheless the western township-county plan is the most

[1] Township organization has been adopted in the following western states and territories: Ohio, Indiana, Michigan, Illinois, Wisconsin, Minnesota, Iowa, Kansas, Missouri, Nebraska, Dakota, and, nominally, in California. The local constitutions of New York and Pennsylvania, as the direct prototypes of those of the states enumerated, will also be compared in this chapter.

advanced phase of local institutions; and it is practically new as compared with any form which has existed since the days of Edward I. The fact is, the causes which produced a decay of the county court and substituted for it a board of royal commissioners,[1] wrought a great and unfortunate disturbance in the equilibrium and interdependence of local organisms. Neither the complex expedients of modern England—recently described as a three-fold chaos of areas, rates, and authorities[2]—the New England town organization over-developed at the expense of the shire, nor the county of the Southern colonies over-developed at the expense of the parish, —constitutes a normal, far less an ideal, method of local government suitable for great areas and dense populations under present economic and social conditions.

But there was no time during the Colonial period,[3] even in Massachusetts or Virginia, when some trace of co-operation between county and town did not exist; while in Pennsylvania and New York, important elements of the present system were already developed. But the development was by no means complete. The restoration of the proper balance of political power was destined to be the result of frequent compromise and sometimes of protracted struggle. Yet even as it now exists, the western method of local government, for simplicity, symmetry, flexibility, and administrative efficiency, is superior to any other system which the Teutonic mind has yet produced.

The history of town organization in the West begins with the ordinance of 1785, which provided for the survey and sale of the lands ceded to the national government by various states and by certain Indian tribes.[4]

[1] See below Chap. VI, v, and the chapter on the Justice of the Peace in Vol. II.

[2] By Mr. Goschen, cited by Prof. Goodnow in *Pol. Sc. Quart.* June, 1888, p. 313.

[3] Except, of course, in the very beginning before counties were formed.

[4] For an account of the treaties of 1768, 1784, and 1785 with the Six Nations and other tribes, see Hinsdale, *The Old Northwest*, 256.

On May 7, 1784, Jefferson reported to Congress an ordinance for locating and disposing of the public domain, providing for the division of the lands into townships each of ten geographical miles square, and of the townships into hundreds each of one mile square. But no final vote was taken on the report.[1] Here the matter rested until April 12, 1785, when a committee, appointed to frame an ordinance for disposal of the western lands, submitted a report drafted by Grayson of Virginia. The report was amended and finally adopted on the twentieth of May.[2]

The ordinance provided for a corps of surveyors placed under the direction of the Geographer of the United States, an officer who performed the duties subsequently entrusted to the Surveyor General. The following are the provisions of the act with which we are here concerned: "The surveyors . . . shall proceed to divide the said territory into townships of six miles square,[3] by lines running due north and south, and others crossing these at right angles, as near as may be. . . .

"The first line, running north and south as aforesaid, shall begin on the River Ohio, at a point that shall be found to be due north from the western termination of a line which has been run as the Southern boundary of the State of Pennsylvania; and the first line running east and west shall begin at the same point and shall extend throughout the whole terri-

[1] Bancroft, *History of the Formation of the Constitution*, I, 158–9.

[2] Bancroft, *Hist. of the Formation of the Constitution*, I, 180–1. There is some doubt as to who was the author of the plan of survey; but it was probably Thomas Hutchins, first Geographer of the United States, who is said to have conceived the idea as early as 1764 when acting as engineer for an expedition to Ohio under Col. Henry Bouquet: see Hinsdale, *The Old Northwest*, 262. But the authorship is claimed by Prof. Austin Scott for De Witt, the Dutch surveyor: see Shosuke Sato, *The Land Question in the U. S.*, 134.

[3] The report of the Committee provided for townships 7 miles square; but the motion of Grayson that they should be six miles square was adopted. Bancroft, *Hist. of the Formation of the Constitution*, I, 181.

tory, provided that nothing herein shall be construed as fixing the western boundary of the State of Pennsylvania. The Geographer shall designate the townships, or fractional parts of townships, by numbers progressively from south to north; always beginning each range with No. 1; and the ranges shall be distinguished by their progressive numbers to the westward. The first range, extending from the Ohio to the Lake Erie being marked No. 1. The Geographer shall personally attend to the running of the first east and west line; and shall take the latitude of the extremes of the first north and south line, and of the mouths of the principal rivers.

"The lines shall be measured with a chain; shall be plainly marked by chaps on the trees, and exactly described on a plat, whereon shall be noted by the surveyor, at their proper distances, all mines, salt-springs, salt-licks, and mill-seats, that shall come to his knowledge; and all water-courses, mountains, and other remarkable and permanent things, over and near which such lines shall pass, and also the quality of the lands.

"The plats of the townships respectively, shall be marked by subdivisions into lots of one mile square or 640 acres, in the same direction as the external lines, and numbered from 1 to 36; always beginning the succeeding range of the lots with the number next to that with which the preceding one concluded. And where, from the causes before mentioned, only a fractional part of a township shall be surveyed, the lots protracted thereon, shall bear the same numbers as if the townships had been entire. And the surveyors in running the external lines of the townships, shall, at the interval of every mile, mark corners for the lots which are adjacent, always designating the same in a different manner from those of the townships.

"The geographer and surveyors shall pay the utmost attention to the variation of the magnetic needle; and shall run and note all lines by the true meridian, certifying, with every

plat, what was the variation at the times of running the lines thereon noted."[1]

The ordinance of 1785, in spite of various defects,[2] subsequently removed, may justly be regarded as one of the most important administrative measures which has ever been produced. It comprised all the essential features of our present incomparable system of land surveys, since brought to perfection by a series of statutes, and applied to the entire public domain of the United States. Its economic effects have indeed been vast and beneficent. The simplicity and cheapness of the system have greatly facilitated the rapid settlement of our western territory. This fact will be appreciated by those who know from experience the ease and certainty with which the pioneer on the great plains of Kansas, Nebraska, or Dakota is enabled to select his "homestead" or "locate his claim" unaided by the expensive skill of the surveyor. "With all its defects," says a recent writer, "this ordinance was perfection itself compared with the old colonial methods; say, that of Virginia. Here the State made no surveys whatever before disposing of the lands to the settler or speculator. The prospective owner sought out a tract of land that pleased him, and caused a survey to be made and marked the latter generally by 'blazing' the trees with a hatchet. The survey was then recorded in the State land-office, and became the basis for warrants covering the land. Such was the way in which the lands of West Virginia and Kentucky were 'taken up.' . . . The pre-emptor was never obliged to wait for the surveyor.

[1] *Journals of Congress*, IV, 520; copied from Hinsdale, *The Old Northwest*, 257–258. The ordinance is printed entire in the *Life and Journals of Manasseh Cutler*, II, 431–8.

[2] Such were the provisions for allotting the lands among the various states in proportion to "the quotas in the last preceding requisition on all the states," the sale at auction by commissioners of the loan offices in the respective states, and the lack of a smaller division than one mile square. Cf. Hinsdale, *The Old Northwest*, 259, 302; Cutler, *The Ord. of* 1787, in *Ohio Arch. and Hist. Quart.* I, 32.

Such a system led to the 'running out' of all sorts of tracts of land. Half a dozen patents would sometimes be given for the same tract. Pieces of land, of all shapes and sizes, lay between the patents; and in time, as lands became more valuable, huge 'blanket' patents were thrown out to catch these pieces."[1]

But the institutional results of the Ordinance of 1785 are scarcely less important than the economic. Everywhere in the Northwest Territory and in the vast regions beyond the Mississippi and the Missouri, the government surveyor, even in advance of the pioneer, has laid the first foundation of local institutions. He has assigned the name and defined the territorial limits of the future social and political unit. Manifestly the "congressional" township, though as such absolutely devoid of organization, is nevertheless a municipal body in embryo requiring but slight encouragement to develop into a living body.[2] Indeed there is usually a well defined transitional stage. In those states where the county-precinct organization prevails—and as a rule that system precedes the township-county plan—the precinct is well on the way to complete municipal development. As the electoral unit or as the district of justice and constable, it possesses some of the essential attributes of the self-governing township.

Moreover it is extremely interesting to know that the framers of the ordinance were fully aware of its institutional significance. It was provided that every alternate township should be sold in a body without subdivision and the remaining half by sections. "The South, accustomed to the mode of indiscriminate locations and settlements, insisted on the rule which would give the most free scope to the roving emigrant; and, as the bill required the vote of nine states for

[1] Hinsdale, *The Old Northwest*, 260. For Kentucky, see Shaler, *Kentucky*, in Commonwealth series, 49 ff., and *Hinsdale*, 261. But read especially the interesting discussion of the Ordinance in the *Life and Journals of Manasseh Cutler*, I, 123 ff., where the opinions of Washington and others are compared.

[2] Cf. Shaw, *Local Government in Illinois*, 10.

adoption, and during the debates on the subject more than ten were never present, the eastern people, though 'amazingly attached to their own custom of planting by townships' yielded to the compromise that every other township should be sold by sections."[1] So the ordinance of 1785 is the first act in the sectional conflict for control of local institutions in the Northwest.[2]

Among the forces predetermining the character of social organisms in the Northwest, second in the order of time but first in deep and far-reaching influence, stands the Ordinance of 1787. By this instrument the formation of townships and counties is expressly contemplated.[3] But it is those remarkable provisions concerning freedom, property, representation,

[1] Bancroft, *Hist. of the Formation of the Constitution*, I, 181, citing a letter of Grayson to Madison, dated May 1, 1785. Cf. *Life and Journals of Manasseh Cutler*, I, 126 ff. It would seem to be exceedingly fortunate that the township of six miles square was adopted, rather than either that of Jefferson or that of the Committee. A larger area would, doubtless, have been an impracticable subdivision of the county.

[2] The restrictions upon the subdivision and sale of the public lands were removed by Congress at an early day. The act of 1796 provided for the appointment of a Surveyor General and created the present system of numbering the sections, "beginning with the number one in the northeast section, and proceeding west and east alternately, through the township with progressive numbers till the thirty-sixth be completed:" *U. S. Statutes at Large*, I, 466. By an act of Feb. 11, 1805, the Surveyor General was required to subdivide the lands into quarter sections: *Ib.*, II, 313. In 1820 sale was authorized in half-quarter sections; and in 1832, in quarter-quarter sections: *Ib.*, III, 566; IV, 503. See Carhart, *Plane Surveying*, 295 ff.; Webster, *Works*, III, 263; Shosuke Sato, *The Land Question in the U. S.*, *Studies*, IV, 391 ff. The principal provisions of the Ordinance are given by Albach, *Western Annals*, 434–8; and Blanchard, *Discovery*, 188–9. The most extended discussion of the method and procedure in making a government survey will be found in Donaldson, *The Public Domain*, 178 ff., 576 ff. For the literature relating to the public lands, see Winsor, *Narrative and Crit. Hist.*, VII, 533.

[3] "Sec. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order of the same:" Poore, *Charters*, I, 430.

"religion, morality and knowledge," that have caused the 'magna charta' of the West to be regarded as the greatest monument of statesmanship, modern or ancient;[1] and they are of supreme interest from our present point of view. The guaranties of the compact—which were to remain unalterable, unless by common consent—particularly the prohibition of slavery,—"fixed forever the character of the population in the vast regions northwest of the Ohio,"[2] and, let us add, the still broader domain west of the Mississippi.

As in the case of the Ordinance of 1785, the wisdom of New England united with that of the South to produce this measure: by the votes of the South it was adopted, in the brain of Manasseh Cutler of Massachusetts it was conceived. But from an early day it was clear that the West would become the heritage of the men of the Eastern and Middle States, and that the civil institutions which they should establish must be largely the results of the blending of those with which they were respectively familiar.[3]

[1] "We are accustomed to praise the lawgivers of antiquity; we help to perpetuate the fame of Solon and Lycurgus, but I doubt whether one single law of any lawgiver, ancient or modern, has produced effects of more distinct, marked, and lasting character than the Ordinance of 1787;" Webster, first speech on Foot's Resolution, *Works*, III, 263.

[2] Webster, *Works*, III, 264, 277 ff.

[3] The principal authority on the origin of the Ordinance of 1787 is the *Life and Journals of Manasseh Cutler*, Vol. I, Chap. VIII, and Vol. II, Appendix "D." See also Poole, *Dr. Cutler and the Ordinance of* 1787, in *N. A. Review*, April, 1876; Hinsdale, *The Old Northwest*, Chaps. XV, XVI, and his Article in *Mag. of West. Hist.* July, 1887; Adams, *Maryland's Influence upon Land Cessions to the U. S.*, in *Studies*, Vol. III; Shosuke Sato, *Hist. of the Land Question in U. S.*, *Studies*, IV, 338 ff.; Bancroft, *History of the Formation of the Const.*, II, Ch. VI; Cutler (W. P.), *The Ordinance of* 1787 in *Ohio Arch. and Hist. Quart.*, I, 10–37; Smith, *St. Clair Papers*, I, 118 ff.; II, 603 ff.; Andrews, *The Beginning of Our Col. System*, in *Ohio Arch. and Hist. Quart.*, 1–9; Mathews, *The Earliest Settlement in Ohio*, in *Harper's Mag.*, Sept. 1885, and his *Organization of the Ohio Land Co.*, in *Mag. West. Hist.*, I, 32 ff.; Graham, *The Beginning of Education in the Northwest Territory*, in *Mag. West. Hist.* Feb. 1888; Strong, *Hist. of Wisconsin Territory*, 155–6; Alderman, *Marietta, Ohio, Hist. Considered*, in *Mag. West. Hist.*, March, 1888; Williams, *Arthur St. Clair and the Ordinance*

(*b*).—*The Sectional Rivalry of Local Organisms.*

It appears to be generally true that emigration in the United States follows the lines of latitude. In accordance with this so-called "law" of migration, the regions of the Southwest have been peopled largely by settlers from the southern states carrying with them the county system with which they were familiar. On the other hand, the local institutions of the Northwest are the result of a fusion of the social elements of New England and the Middle States.

In some instances the establishment of township-county government has been a silent and seemingly easy process. In others it has been merely a question of expediency as to the time when it should be introduced. But in one or two cases a sharp sectional diversity of population has given rise to a protracted conflict of local organisms, exceedingly instructive to the student of comparative sociology.

Provision for the first civil townships in the West was made in 1790 by an act of Governor St. Clair and the Judges of the Northwest Territory. But these towns were invested only with rudimentary powers. It was enacted that each county should be divided by the justices of the court of quarter sessions into townships with such "bounds, natural or imaginary, as shall appear to be most proper;" and for each the court should appoint a constable to act, "specially" for the

of 1787 in *Mag. West. Hist.*, I, 49 ff.; Campbell, *Pol. Hist. of Mich.*, 206 ff.; Hildreth, *Hist. of U. S.*, III, 527. The first number of Vol. II, of *Ohio Arch. and Hist. Quarterly*, 251 pages, is devoted to the Marietta Centennial Celebration; see particularly the addresses of Hon. Geo. F. Hoar, Hon. J. R. Tucker, and Judge Joseph Cox. The now famous letter of Dane to Webster is printed in *Procds. Mass. Hist. Soc.*, X. 475–480. See also Farmer, *Hist. of Detroit and Mich.*, 85–6; Curtis, *Hist. of the Const.*, I, 301, 452; II, 344; Cooper, *American Politics*, Bk. IV, 10–13; Lalor, *Pol. Cyc.*, III, 31; Cooley, *Michigan*, 127; Albach, *Western Annals*, 466 ff.; Donaldson, *The Public Domain*, 153–6; Monette, *Hist. of Disc.*, etc., II, 237–40; Wilson, *Slave Power*, I, 31–8; Burnet, *Notes*, 37–8. A bibliography of the Ordinance is given by Winsor, *Nar. and Crit. Hist.*, VII, 538.

township, and "generally" for the county; also a clerk and one or more overseers of the poor.[1] However in 1802 the general assembly of the Northwest Territory provided for a more popular organization. A town-meeting was instituted, but only for purposes of election. The number of officers was greatly increased and all were to be chosen by ballot. Each town was to elect a clerk, two or more overseers of the poor, three fence viewers, two appraisers of houses, one lister of taxable property, one or more constables, a sufficient number of supervisors of roads, and three or more trustees or "managers," the latter to exercise the general supervisory powers of a town board.[2] The principal features of this act were embodied in the early laws of the state of Ohio; but there the duties of the quarter sessions passed to the county commissioners and the township trustees were allowed a restricted right of taxation.[3]

The township-county organization whose genesis in the West we have thus noted was the result of a sectional compromise; but, nevertheless, in substance it was merely the system already existing in Pennsylvania somewhat modified by eastern and, particularly, southern influences.[4] And it seems to have been established quietly without sharp or protracted struggle.

The most remarkable illustration of such a sectional rivalry is found in the history of Illinois—the third commonwealth formed in the Northwest Territory in pursuance of the

[1] Chase's *Statutes of Ohio and the N. W. Territory*, I, 107–8.

[2] Chase's *Statutes of Ohio and N. W. Territory*, I, 344–5. See the record of a meeting of Cleveland Township, April 4, 1803: *Mag. West. Hist.*, IV, 69–70.

[3] Chase's *Statutes of Ohio and N. W. Territory*, I, 370, 397 ff., 636, 700.

[4] A plurality of the settlers and legislators of the Northwest Territory were from the Middle States, a large contingent from Virginia and Maryland, and still fewer from New England. The influence of Pennsylvania, was especially great. Governor St. Clair himself was a Pennsylvanian of Scotch descent, and he did much to determine the character of civil institutions in the Territory. See Hinsdale, *The Old Northwest*, 284, 325, 300.

Ordinance of 1787. Previous to 1818, when she was admitted to the Union, the inhabitants were almost exclusively from Virginia, Kentucky, and the Carolinas, the majority being settled in the southern end of the state. Consequently the constitution of 1818, and laws made under it, "placed the entire business management of each county" in the hands of three County Commissioners, the state being divided into fifteen large counties.[1]

"But even at this time there had been planted in Illinois, and throughout the whole West, a germ capable, under right conditions, of developing a highly organized township system. In dividing and designating the public domain, the Congress of the United States had early adopted the system of surveying into bodies six miles square, and had given these divisions the New England name of *townships*. For purposes of record and sale, each township was divided into thirty-six sections a mile square, and these were further subdivided. Every man held his land by a deed which reminded him that his freehold was part of a *township*, and there is much even in a name. But further than this, the United States had given to the people of every township a mile of land, the proceeds of which should be a permanent township school-fund. To give effect to this liberal provision, the state enacted a law making the township a body corporate and politic for school purposes, and authorizing the inhabitants to elect school officers and maintain free schools. Here then was a rudiment of local government. As New England township life grew up around the church, so western localism finds its nucleus in the school system. What more natural than that the county election district should soon be made to coincide with the school township, with a schoolhouse for the voting place? or, that justices of the peace, constables, road supervisors, and overseers of the poor, should

[1] Shaw, *Local Govt. in Ill.*, 9.

have their jurisdictions determined by those same township lines?"[1]

With the admission of Missouri as a slave state in 1820, northern Illinois began to be occupied by settlers from the eastern and middle states, while southern emigration was directed to Missouri. A long and bitter sectional struggle ensued, terminating only with the revised constitution of 1847, by which the legislature was authorized to provide for township organization by a general law which should allow each county to adopt it whenever a majority of the voters therein should so decide. The northern counties immediately proceeded to organize townships under the law enacted in pursuance of this requirement. Gradually the southern counties have followed their example, until, at the present moment, but twenty-three out of the one hundred and two counties of the state still maintain the early system.[2]

"This," remarks Dr. Shaw, "was one of those happy, but unusual, compromises whereby both parties gain their principle. It was rendered possible by the distinctly sectional line of demarcation which separated the two elements of population. In Ohio and Indiana the same diverse elements of population had been more thoroughly commingled; and their 'compromise' system was the outcome of mutual concession—a hybrid affair, in which township organization was very limited and imperfect."[3]

The history of local government in Illinois seems about to find a parallel in that of Missouri. After the Civil War a considerable emigration from the North and East was gradually directed to that state; and, as a consequence, an agitation for a change in the form of local government—which bore the essential features of the Virginia system—speedily arose.

[1] Shaw, *Local Govt. in Ill.*, 10.

[2] On the authority of a letter to the author from Hon. Henry D. Dement, Secretary of State, dated June 27, 1888.

[3] Shaw, *Local Govt. in Ill.*, 11.

The framers of the constitution of 1875 met the question by proposing the solution which had proved so successful in the case of Illinois. The assembly was authorized to provide, by general law, for township government "under which any county may organize, whenever a majority of the legal voters of such county . . . shall so determine."[1] Not, however, until 1879 was the law contemplated in the constitution enacted, and it has been very slowly put in force; at present but eighteen out of one hundred and fourteen counties having adopted township organization.[2]

Even during the colonial era the sectional rivalry between the two forms of local organization within the same commonwealth had begun, notably in South Carolina.[3] At the beginning of the eighteenth century a parish system was established as a part of the ecclesiastical constitution. But the South Carolina parish was a civil as well as a spiritual body, possessing an exceedingly liberal organization. The spirit of the latter was democratic; and as a means of local self-government the parish proved satisfactory to the inhabitants of the low country, though they were of very heterogeneous origin, until 1865.[4]

A different system was established in the "up" or "back country." This region, long separated from the coast parishes by an uninhabited wilderness, was slowly occupied after 1736, mainly by emigrants from Virginia, Pennsylvania, and other middle colonies, advancing from the north to the rear of the earlier settlements.[5] Here no form of local organization

[1] Constitution of 1875, Art. IX, sec. 8, Poore, *Charters*, II, 1185.

[2] On the authority of a letter to the author from Hon. M. K. McGrath, Secretary of State, dated June 26, 1888.

[3] On this topic see Ramage, *Local Government and Free Schools in South Carolina*, *J. H. U. Studies*, I; and Ramsay, *History of South Carolina*, II, Chap. III.

[4] Ramage, *Local Government and Free Schools in South Carolina*, 22.

[5] Ramsay, *Hist. of South Carolina*, I, 118; Simms, *Hist. of South Carolina*, 142 ff.

existed until 1769. Hitherto the only courts in the entire colony were held in Charlestown. To enforce the laws in the remote settlements of the interior was impossible, and the people resorted to self-help through means of the "Regulators." To obviate these evils, in the year mentioned, judicial districts for the holding of "circuit courts" were established in the up country. And in 1785,[1] under Virginia influence, it was ordered that these districts should be divided into counties; but in 1798 the latter system was abrogated,[2] and the name "district" substituted for that of "county;" and the district plan, side by side with the parish system of the coast, survived until the Civil War. Finally under the constitution of 1868, the long rivalry terminated in a victory for county organization. The entire state was subdivided into counties, subordinate to which were townships with rudimentary powers.[3]

(c).—*The Economic Rivalry of Local Organisms.*

Another form of conflict in local organisms exists in several of the northwestern states dependent upon conditions other than sectional diversity of population. To understand its nature an important fact very evident to the careful observer, but nevertheless disregarded by writers on American institutions must be considered.

County organization is usually established in new states and territories, even when the constituency of the population and other conditions are in themselves favorable to town government, a number of years before the latter is adopted. The reason is not far to seek: county government is cheaper and

[1] *South Carolina Statutes at Large*, IV, 661. Cf. Ramsay, *Hist. of South Carolina*, II, 71. But an ordinance for dividing the districts into counties was passed in 1783: *Statutes at Large*, IV, 561.

[2] *South Carolina Statutes at Large*, VII, 283 ff.

[3] Ramage, *Local Government and Free Schools in South Carolina*, 20–26.

simpler: indeed, many regard it as the only practical form of local administration while the population is small and dispersed over large areas. There are two considerations which must not be overlooked in this connection. In the first place the county of the Northwest is a very different institution from that which preceded it. Since the Conquest the English shire has always been highly centralized; that of colonial Virginia was scarcely less so; while only in New York, Pennsylvania, and in early Massachusetts was the elective principle at all pronounced.[1] But the western county is a republic. Its officers are chosen by and responsible to the people. It is, in short, a township in every essential respect save the possession of a folkmoot. Accordingly, experience has shown that the county may safely be adopted, even by those with strong predilection for the town system, as the cheapest and simplest form of local administration during the infancy of a commonwealth. Therefore it may perhaps be regarded as a "law" of western political evolution, that the county-precinct should precede the township-county system in the order of development.

There is a second consideration which has already been casually alluded to. The conditions of western colonization are very different from those which existed in the days of John Smith or William Bradford. The western pioneer *may* become the member of a "town company" or a speculator in vast tracts of land. But neither close town-life nor large plantations is the normal mode of settlement. The isolated homestead of a half, a quarter, or a half-quarter section is the usual domain of the western farmer. Besides, the superior means of transportation possessed by the modern pioneer, the certainty that the railway will speedily follow, if indeed it has not preceded him; and the comparative freedom from danger from savage man or beast,—render him almost independent with respect to neighbors in the selection of his

[1] Perhaps Delaware should also be here mentioned.

"claim." Thus all the conditions are from the start favorable to a somewhat evenly distributed population, and, therefore, to the larger area of the county as the territorial unit.[1]

Now, with the increase of population and the expansion in the volume of public business, there comes a time when it is felt that county government fails to reach the extremities of the body politic, when there seems to be need of a smaller governmental district in order that opportunity may be afforded for the more intimate participation of every citizen in the management of domestic affairs. Then begins an agitation for township organization which sometimes develops into a long and sharply contested struggle. No doubt inherited prejudices on the part of the electors, as in the cases already discussed,[2] usually constitute an important element of the conflict; but it is fought out mainly on economic grounds. Will not the new government on account of the multiplicity and reduplication of offices be much more expensive than the old? Will the new board of supervisors—a local legislature, sometimes composed of many members—be able to administer public affairs as promptly, intelligently, and honestly as the commissioners? Does not the present system favor the city at the expense of the country, and will not the change destroy the official monopoly of the "courthouse ring?" These are some of the considerations which have weight at the polls.

The history of Nebraska affords an excellent example of

[1] It should be noted that the conditions affecting the first occupation of new territories is here the subject of discussion. Undoubtedly in the West as elsewhere there is a strong tendency towards a too rapid development of village and city life. "America forms no exception to the rule that population in civilized lands gravitates towards great centres. Though her immense agricultural development might have been expected to arrest this movement and divert population to the rural districts, such has not been the case:" Carnegie, *Triumphant Democracy*, 46 ff.

[2] It is very probable that, even in Illinois and South Carolina, the economic considerations, about to be mentioned, particularly the *inertia* of vested interests—of established institutions—had more to do with the conflict, than has been supposed or can now be ascertained.

the economic rivalry of local organisms. When the territorial government was established in 1854, the county was chosen as the political unit;[1] and under the constitution of 1867, the same system was continued. Not until 1875 was the first definite step taken toward the substitution of the township-county plan. In the constitution of that year the legislature, following the Illinois precedent, was authorized to frame a general township act whose adoption should be left to the voters of the respective counties.[2] Thereafter at each session of the legislature attempts were made to enact a township law; but only in 1883 was it accomplished. And in the five years which have since elapsed but twenty-four out of the eighty-three organized counties of the state have put the law in operation.[3]

The result shows conclusively that the sources of population have had little to do with the matter. The vast majority of the people of Nebraska, directly or indirectly, are emigrants from New England and the Middle States. Yet among the counties that still refuse to adopt township organization are some, such as Lancaster, Douglas, and Johnson, which are the most populous and very decidedly northern in sentiment; while among those counties first to put the act in force are some of the newer and less densely settled, though their inhabitants are probably not more homogeneously northern in origin than the others.

By the constitution of California, adopted in 1879, the legislature is required to provide by general law for township organization, to be carried into effect on the county-option plan.[4] Accordingly an act of 1883 provides for a uniform system of county and township government. But the California township as thus created is an inchoate organism being

[1] *Complete Session Laws of Neb.*, I, 9, 94, 300, 236, etc.

[2] *Const. of Neb.*, 1875, Art. X, sec. 5, *Compiled Statutes*, 1887, p. 32.

[3] See the *Catalogue* published by the *State Journal Company* for 1888, pp. 8–9.

[4] Constitution of California, Art. XI, sec. 4, *Laws of* 1887, p. XLV.

little more than a precinct or district for the constable and justice of the peace.[1]

Even more interesting than the county-option method and still better calculated to satisfy the requirements of local sentiment and local economic conditions, is the plan of township-option instituted in Minnesota[2] and recently borrowed in its entirety by Dakota. In the last named territory the county-option plan was first tried;[3] but in 1883 it was enacted that "whenever a majority of the legal voters of any *congressional township* in this Territory containing twenty-five legal voters, petition the board of county commissioners to be organized as a town . . . , said board shall forthwith proceed to fix and determine the boundaries of such new town and to name the same; and said board shall make a full report of all their proceedings . . . , and file the same with the county auditor or county clerk."[4] By this system, it is readily seen, that any congressional township within any county of the territory, having a voting population of no more than twenty-five, can put the township law in operation without affecting other districts in the same county which may remain as before solely under the direct supervision of the county authorities.[5] The motive of this plan is thoroughly English. By it the spirit of localism is allowed the freest scope: what is lost in symmetry is more than gained in flexibility. By the county-option method two forms of local government may coexist in the same state; by the township-option plan they may flourish in the same district side by side. And it is evident that the primary object of either method is, not so much to allow free

[1] Each township is to have two constables, two justices, and such inferior officers as the law or the county board of supervisors may determine: *Laws of* 1883, p. 315.

[2] *Statutes of Minnesota*, 1878, p. 168.

[3] *Revised Codes of Dakota*, 1877, p. 62.

[4] *Laws of Dakota*, 1883, pp. 231–2; *Compiled Laws*, 1887, p. 173. The provisions of the act are identical with those of the Minnesota law.

[5] Letter to the author from Hon. P. F. McClure, Commissioner of Immigration and Statistics, dated July 19, 1888.

play to opinions dependent upon sectional bias—though indeed this is permitted—as it is to allow each community the right to determine for itself the *time* when, economically or politically, a higher degree of localization is expedient.

But when civil institutions were first established in the Northwest Territory, it was impossible to conceive the methods which would best be adapted to the conditions of western settlement fifty years in advance. Besides the relative advantages of town and county government were not well understood. The real capabilities of the fully developed county-republic with its elective officers were not yet entirely revealed. The problem of local government, therefore, was solved in a different way. Let us see how this was done in a particular instance.

The institutional history of Michigan is of peculiar interest not only because that state was the first west of the Alleghanies to adopt and ultimately put in successful operation the New York system of representative local government, but because, on account of the preponderance of New England ideas, the township was introduced at an earlier stage than we should now think best from an economic point of view.

During the territorial period several phases of institutional development may be traced. In 1805 judicial districts were created by Governor Hull, and it was expected that they should ultimately be subdivided into counties.[1] The gradual differentiation of local offices and functions constitutes a second stage. Thus the congressional townships were adopted as highway districts, and the governor was authorized to appoint a "supervisor" for each.[2] In like manner, as early as 1809,

[1] *Territorial Laws of Mich.*, I, 17. Various counties were formed during the administration of Gen. Cass: *Ib.*, Index at *Counties*. But as early as 1798, under the law of 1790 enacted by the governor and judges of the Northwest Territory, four townships were created in Wayne county: Farmer, *Hist. of Detroit and Mich.*, 127.

[2] In 1805 the governor was authorized to create highway districts and appoint supervisors: *Territorial Laws*, I, 77–8, 178–9; II, 93. But in 1819

commissioners for the care of the poor in each county were appointed.[1] Municipalities were also granted powers of self-government by special enactment. Thus in 1815 Detroit was incorporated as a city with elective trustees and the right to levy taxes for local purposes; and in 1821 Prairie du Chien was made a borough with similar powers.[2]

A third and more important epoch was reached in 1825 when the governor and council were authorized by Congress to incorporate civil townships and provide for the election of township and county officers.[3] This was the real beginning of the elective township-county system in Michigan; and in 1827, by three separate enactments, the New York system, with a numerous body of town officers, a restricted right of local taxation, and representation on the county board, was introduced.[4] Still the authority of the county greatly exceeded that of the town; but the powers of the latter have steadily increased until the present time.[5]

Now what were the forces which determined the course of institutional development in Michigan? Dr. Bemis has pointed out that in 1805 the laws established in the Territory were derived from those of Virginia, Ohio, New York, and Massachusetts "in about equal proportions;" and "as the Ohio legislation was in part a copy of Virginia and Pennsylvania

it was enacted that the appointment should be made on nomination of the county commissioners: *Ib.*, I, 449; and in 1825 the commissioners were given the power of dividing the county into districts: *Ib.*, II, 289.

[1] *Territorial Laws of Mich.*, II, 41. Dr. Bemis, *Local Government in Michigan and the Northwest*, 10, states that highway commissioners were also given the relief of the poor in 1820.

[2] Bemis, *Local Govt. in Michigan and the Northwest*, 10; *Territorial Laws of Mich.*, I, 534–41, 236–43.

[3] Act of Feb. 5, 1825: *U. S. Statutes at Large*, IV, 80. But the right of election did not extend to sheriffs, justices of the peace, judges of probate, or clerks and judges of courts of record. However Gen. Cass insisted that even these should be nominated by vote of the people before formal appointment by him: Campbell, *Political History of Mich.*, 413.

[4] *Territorial Laws of Mich.*, II, 317–25, 325–29, 584.

[5] Bemis, *Local Govt. in Mich. and the Northwest*, 10–11. Cf. Chap. X, II, (c).

laws, the influence of the two different systems of local government, centralized and decentralized, was about equal." But the great majority of the later settlers in the Territory were men from New York and New England, bringing with them a strong love for township organization; and between 1813 and 1831 the desire for local self-government was fostered by the great personal influence of General Cass. "He was thoroughly imbued with New England ideas of local government, under which he was born and brought up. He gradually abandoned the appointment of county and township officers, and urged, nay, required the people to elect them."[1] Thus the establishment of the township-county system, twelve years before the attainment of statehood, would seem to have been the result of strong sectional bias. But was not its introduction really premature? Economically would it not have been cheaper and more convenient to have retained the county as the political and administrative unit for a longer period? To-day, under precisely the same conditions as to origin and density of population, the centralized county-precinct system would probably be regarded as entirely adequate; or, at most, one or the other method of local option would be put in requisition. Still it must not be supposed that, in the sparsely settled frontier regions, there was, in practice, an entirely useless reduplication of local offices such as would have resulted from a thorough enforcement of the mixed township-county system. The fact is that in Michigan, just as in New England, the planting of townships preceded the organization of counties. "For the sake of uniformity in lines and limits our counties were many of them formed by legislative enactment before there was any settlement in them. As they gradually became inhabited township organizations were formed, frequently including entire counties, and all such were attached to organized counties for judicial purposes until

[1] Bemis, *Local Govt. in Mich. and the Northwest*, 10–12. Cf. Campbell, *Pol. Hist. of Mich.*, 392, 413; Cooley, *Michigan*, 201, 205.

after the county itself was organized. The actual township organization always preceded the county organization and the latter seldom, if ever, took place until after there were three organized townships within its limits."[1]

This, however, was pursuing democratic self-government under some difficulty. Owing to the vast area of the townships[2] and the scattered settlements therein "the law authorized two days' election and allowed the inspectors to open the polls at a different point in the township on each day;"[3] moreover the town-meeting, when the entire voting population was assembled, sometimes comprised but eight or ten electors.[4]

II.—Constitutional Limitations of the Township.

(*a*).—*Differentiated Forms.*

English local bodies were originally characterized by an individuality and spontaneity of growth which even the hand of the modern statute-maker has not been able entirely to destroy. In the seventeenth century scarcely any two towns or parishes possessed precisely the same organism or customs, though essentially the same type everywhere prevailed. In the new commonwealths of the West the case is very different. The local organizations within each particular state are constructed on exactly the same general model. Every town or county is the duplicate of every other. On the contrary, between the different states, there is theoretically complete independence in this regard. Within the broad limits per-

[1] Extract from a letter to the author from the Hon. Michael Shoemaker, Chairman of the Committee of Historians of the Michigan Pioneer and Historical Society.

[2] A single township sometimes comprised a whole county: see examples in *Mich. Pioneer Collections*, I, 171; II, 280, 289; III, 387, 493; VII, 519, 228, 261. Or even two or three counties: *Ib.*, I, 208; VII, 471.

[3] Judge Miller in *Mich. Pioneer Coll.*, VII, 228.

[4] *Mich. Pioneer Coll.*, VII, 418, 519.

mitted by the fundamental law of the Republic, the legislature of each commonwealth is an autocrat, and may create such civil bodies as it sees fit. But this is true only in theory; in practice, the experience of the older states has constituted a common stock for the younger whose laws and institutions are the result of "natural selection." Thus it happens that, while the statutes differ widely in subordinate features, but three well defined general types of township organization exist in the western states and territories.

1. The lowest or least developed type is that which first arose in Pennsylvania, and which, with various modifications, has since been adopted by Ohio, Indiana, Iowa, Kansas, and Missouri. Under this, the so-called "Pennsylvania plan," the people possess the essentials of local self-government. The township is usually a self-taxing body;[1] has a corps of officers, more or less numerous, chosen by popular ballot; and it is sometimes entrusted with a most important branch of local administration—the management of the public schools. Beyond these limits its constitution does not extend. Two important attributes of the highest type of town organization are lacking: the right of representation on the county board, and the deliberative folkmoot—the principal marks of class differentiation. Accordingly the township is brought into close subordination to the county authority, and the will of the people finds direct expression only in the choice of officers at the polls.[2]

[1] *Township Organization Law of Mo.*, 18; Gould, *Local Self-Government in Pa.*, 34; Macy, *A Government Text Book for Iowa Schools*, 22.

[2] Among the group of states under consideration the simplest and most rudimentary form of the township is found in Indiana. The duties of clerk, treasurer, fence viewer, inspector of elections, and overseer of the poor are combined in the hands of one officer—the township trustee; but assessors, justices, constables, and road superintendents are also chosen by the people: *Stat. of Ind.*, 1852, 637–9; *Revised Statutes*, 1881, pp. 1019, 1091, 1286. In Ohio, likewise, the functions of the township are comparatively restricted, and the board of three trustees is entrusted with much power. Each town, however, has also a clerk, a treasurer, as many constables and supervisors

2. The second type of town government in the ascending scale is the system developed in Minnesota and transplanted thence to the territory of Dakota. This type differs from the first in the possession of somewhat more extended powers and, possibly, a more evenly balanced and carefully elaborated organism. But its distinguishing mark is the annual town-meeting, assembled not only for the choice of officers but for the enactment of by-laws and the exercise of other functions of a restricted legislative body.[1]

But here, also, is subordination to the county board without representation.

3. The third and highest form of local organization is that usually styled the "New York plan," from the place of its origin, and which has already been established in the states of Michigan, Illinois, Wisconsin and Nebraska. Here the spirit of localism finds opportunity for freest expression. The constitutional organism is symmetrical and complete; the town-meeting possesses powers commensurate with the requirements of modern life; and the primitive and proper nexus between scir and tunscipe is restored. The township is, of course, subordinate to the county, but it is subordination with representation; for, in the county board composed of the supervisors or other head-men of the townships, we behold a rehabilitation of the ancient scirgemot. In short, the representative township-county system of the Northwest seems to be one of the most perfect products of the English mind and worthy to become, as it not improbably may become, the prevailing type in the United States.

of roads as the trustees may determine, and one or more assessors: *Revised Statutes of Ohio*, I, 294–305. Perhaps California should be classed with the states having the Pennsylvania plan; but, as already intimated, the California township is such in little more than name.

[1] *Laws of Dakota*, 1883, p. 235; *Statutes of Minnesota*, 1878, pp. 170 f.

(*b*).—*Subordination to the State.*

The western township as a political body is wholly a creature of the state. It is the aim of the legislator, by a general organic law—often an elaborate instrument—to define exactly all of its corporate powers,[1] and to enumerate exhaustively every general function which its officers may properly discharge. Its character as a municipal corporation is usually defined somewhat as follows:—

"Each township, as a body corporate, shall have power and capacity: First, to sue and be sued, in the manner provided by the laws of the state; second, to purchase and hold real estate within its own limits for use of its inhabitants . . .; third, to make such contracts, purchase and hold personal property, and so much thereof as may be necessary to the exercise of its corporate or administrative power; fourth, to make such orders for the disposition, regulation, or use of its corporate property as may be conducive to the interest of the inhabitants thereof; fifth, to purchase at any public sale, for the use of said township, any real estate which may be necessary to secure any debt to said township. . .

"No township shall possess any corporate powers, except such as are enumerated or granted by this chapter, or shall be specially given by law, or shall be necessary to the exercise of the powers so enumerated or granted."[2]

[1] In Michigan, in early days, just as in colonial New England, each individual township was bounded and incorporated by special act of the legislature. This was originally done under authority of Congress: *U. S. Statutes at Large*, IV, 80. See many examples of special incorporation in the *Michigan Pioneer Collections*.

[2] *Township Organization Law of Mo.*, 5–6; similar provisions are contained in the township acts of all the states. See, for examples, *Compiled Statutes of Neb.*, 316; *Revised Codes of Dakota*, 63; *Laws of Dakota*, 1883, pp. 223–4; *Ohio Revised Statutes*, 1886, I, 279; Shaw, *Local Govt. in Ill.*, 12; *New York Revised Statutes*, I, 805 (copied by Missouri); Howell's *Annotated Statutes of Mich.*, I, 239; *Revised Statutes of Wisconsin*, 1878, p. 269.

In a similar manner the powers which may be exercised by the electors in town-meeting are formally enumerated in the statutes.

(c).—*Subordination to the County.*

Administratively the township is a body subordinate to the county authority, the degree of dependence varying greatly among the different states.

In the first place, where county-option exists, it is the body of electors in the county which determine whether town organization shall be adopted, or whether after adoption it shall be abrogated.[1] Moreover the original division of the county into townships and the creation of new townships by subdivision are placed in the hands of the county board.[2]

The procedure on the adoption of township government by a county may be illustrated from the Nebraska statutes. The election precincts are regarded as townships for the purposes of the first temporary organization. After the choice of officers in such precinct-townships, a "special" meeting of the county board, composed of the newly elected town supervisors, is held, and they are required "to divide such county into towns or townships, making them conform as nearly as practicable to townships according to the government survey. When fractions of townships are caused by the county lines not being

[1] Abrogation of town organization by a majority of the electors of the county is thus provided for in Nebraska: "Whenever a petition or petitions for a submission of the question of the discontinuance of township organization to the voters of his county, signed by not less than one-third of the number of electors of the county, voting at the last general election, shall be filed in the office of the county clerk not less than thirty days before the date of any general election, it shall be the duty of said county clerk to cause said question to be submitted to the voters of said county at such election and give notice thereof in the general notice of such election:" *Compiled Statutes*, 1887, p. 323. Cf. *Township Organization Law of Mo.*, 29.

[2] *Revised Statutes of New York*, II, 929, 931; Howell's *Annotated Statutes of Mich.*, I, 59 (Const., Art. X, sec. 11); *Revised Statutes of Wisconsin*, 1878, p. 239.

in accordance with the surveyed townships, then the county board may attach such fractions to adjoining towns when the number of inhabitants or amount of territory . . . shall not be sufficient for a separate town." In like manner, when an entire surveyed township "shall have too few inhabitants for a separate organization" it may be attached to some adjoining township or divided between two or more as the board shall determine. And "when creeks or rivers so divide a township as to make it inconvenient for transacting town business, then such creek or river may be made the town boundary" and the "fractions so formed may be disposed of as other fractional townships." The county board may also designate the original name of the township, and change the same on petition of the inhabitants.[1]

The county is also invested with a general supervisory authority over the township administration. In Indiana, for example, no taxes may be levied without the approval of the county board.[2] In Nebraska, on failure of any township to organize by choosing officers according to law, such officers may be appointed by the board of supervisors and exercise the same powers as if regularly elected. Moreover, should the officers thus nominated fail to qualify, the board may annex the township concerned to any adjoining township of which it shall thereafter constitute a part.[3] The county board is also entrusted with important duties connected with the issue of precinct or township bonds;[4] in most states it is constituted

[1] *Compiled Statutes of Neb.*, 1887, pp. 315–16, 297; *Revised Statutes of New York*, II, 930; *Revised Statutes of Wisconsin*, 1878, p. 239. In Missouri the county court may make alterations in townships when a majority of the electors in the district affected shall so decide: *Township Organization Law*, 6.

[2] *Revised Statutes of Indiana*, 1881, p. 1286. Taxes are levied by the town trustee and the county commissioners; but in case of disagreement, the commissioners alone may make the levy.

[3] *Compiled Statutes of Neb.*, 317. Cf. *Township Organization Law of Mo.*, 14.

[4] *Compiled Statutes of Neb.*, 487; *Revised Statutes of New York*, II, 930.

the authority for the equalization of assessments;[1] and, in some instances, it is a court of appeal from the decisions of the town officers in various matters.[2]

III.—The Town-Meeting.

(*a*).—*Membership and Organization.*

In those states where either of the two higher types of local government prevails, the town-meeting is the centre of political life.[3] But it does not possess all the attributes of the primitive folkmoot. Popular enthusiasm is less pronounced; the sphere of its activity is more circumscribed; and the members are less conscious of its capabilities. In short the assembly is a commonplace business meeting, the ancient democratic elements having in part yielded to the more efficient and less demonstrative methods of representative government. But the powers of the western town-meeting are commensurate with the needs of a more fully developed society; and there is no reason to regret that the excessive publicity and obtrusive functionalism of primitive New England have not been perpetuated.

In Nebraska the annual meeting is held on the first Tuesday in April at some place designated by the electors in a preceding meeting.[4] Special meetings may also be held when

[1] *Compiled Statutes of Neb.*, 595, 596; *Revised Statutes of New York*, II, 996, 999, 938; *Township Organization Law of Mo.*, 31.

[2] So, in Missouri, appeals from the township board in case of laying out highways may be made to the county court: *Township Organization Law*, 42, 43. In New York appeal lies to the board of supervisors from town auditors of accounts: *Revised Statutes*, I, 836.

[3] Michigan was the first state west of New York to introduce the town-meeting: Bemis, *Local Govt.*, etc., 14. But in 1798, as already noted, the legislation of the Northwest Territory had provided for town-meetings for purposes of election.

[4] *Compiled Statutes*, 1887, p. 317. So also in Illinois and Wisconsin: Starr and Curtis' *Annotated Statutes of Ill.*, II, 2415; *Revised Statutes of Wis.*, 1878,

the supervisor, clerk, and justice of the peace, or any two of them, together with at least twelve freeholders, shall file in the office of the town clerk a statement that such meeting is necessary to the interests of the town, and setting forth its objects. The town clerk, or in his absence, the supervisor, is then required, ten days in advance, to post up notices in five of the most public places of the township, describing the objects of the meeting as specified in the foregoing statement. Special meetings are organized in the same way and the members may exercise the same powers as in annual meetings, except that all of the objects of a special meeting must be published in the notice and not less than one-third of the electors of the township shall constitute a quorum.[1]

On the proper day, at any time between the hours of nine and ten in the morning the meeting may be called to order by the town clerk, or in his absence by a temporary chairman chosen by acclamation. A moderator is then elected as permanent presiding officer, who is required to take an oath faithfully to discharge his duties.[2] The town clerk, as in most states, is *ex officio* clerk of the meeting; and he is required to keep a faithful record of all proceedings, which must be signed by himself and the moderator and preserved among the

p. 273. In Minnesota the annual meeting occurs on the second Tuesday of March: *Statutes*, 1878, p. 169; in Dakota, on the first Tuesday of March: *Compiled Statutes*, 1887, p. 175; in New York, on any legal day between Feb. 1 and May 1: *Revised Statutes*, I, 812.

[1] *Compiled Statutes of Neb.*, 1887, p. 318. Cf. *Statutes of Minnesota*, 1878, p. 170; *Revised Statutes of Wisconsin*, 1878, p. 274; *Compiled Statutes of Dakota*, 1887, p. 176; Starr and Curtis' *Annotated Statutes of Ill.*, II, 2415.

[2] In Michigan the supervisor is moderator, when present; otherwise another of the inspectors of elections, or a chairman chosen *viva voce:* Howell's *Annotated Statutes*, 1882, I, p. 258. In Wisconsin the "chairman of the town" is chairman of the meeting: *Revised Statutes*, 1878, p. 274. In New York such justices of the peace as are present preside: *Revised Statutes*, I, 812. In Minnesota, Illinois, and Dakota, a moderator is chosen for each meeting by the electors: *Statutes of Minnesota*, 1878, p. 171; *Compiled Statutes of Dakota*, 1887, p. 177; Starr and Curtis' *Annotated Statutes of Ill.*, II, 2417.

documents of his office. In the absence of the town clerk, a temporary clerk of the meeting may be chosen.

Every citizen of the township who is entitled to vote at a general election and who has been a resident therein for ten days is an elector.

Vote is usually taken by acclamation or by division, when the result is questioned; but in certain cases, prescribed by law, as for restraining the running at large of stock, vote must be by ballot.[1]

(*b*).—*Functions of the Town-Meeting.*

The electors in town-meeting assembled are invested with important powers of self-government. In the first place, they are formally authorized by law to make all necessary provision for the maintenance of their character as a body politic: to pass all needful orders for the sale, conveyance, regulation, or use of the corporate property, personal or real; to provide for the institution, defence, or disposition of suits at law; and to give all other necessary direction for the exercise of their corporate powers.[2]

In Nebraska and Illinois they may also provide for the planting of trees along the highways; for the construction of public wells and the regulation of their use; and take such action as shall prevent the exposure or deposit of injurious substances within the limits of the town.[3] In Wisconsin, besides powers similar to the foregoing, the electors may levy money for the support of destitute soldiers, to build a town

[1] *Compiled Statutes of Neb.*, 1887, p. 317.

[2] *Compiled Statutes of Neb.*, 1887, p. 316. Cf. *Revised Statutes of Wisconsin*, 1878, pp. 270–71; *Revised Statutes of New York*, I, 808–9; *Statutes of Minnesota*, 1878, p. 170; *Compiled Statutes of Dakota*, 1887, p. 176; Starr and Curtis' *Annotated Statutes of Ill.*, II, 2411.

[3] *Compiled Statutes of Neb.*, 1887, p. 316; Starr and Curtis' *Annotated Statutes of Ill.*, II, 2412.

hall, or establish a town library.[1] In New York they may offer rewards for the destruction of noxious weeds; establish and maintain pounds, and determine by vote the number of assessors, constables, and pound-masters, which shall be elected for the ensuing year.[2]

The right of self-taxation—the first instance of whose exercise by a local body is found in the case of the parish vestry—[3] is still possessed by the township electors, though the amount which may be levied for any purpose is carefully limited by statute. Thus, in Nebraska, they may raise money by taxation for the construction and repair of bridges and highways within the town, and for the purpose of building or repairing bridges over streams which form the boundary between the township and another; for the prosecution or defence of suits at law; for the support of the poor; and for the compensation of town officers.[4]

The town-meeting is also a legislative body authorized to make orders or enact by-laws on a variety of subjects. In Wisconsin, for example, the electors "may make such orders and by-laws for the management of all the affairs of the town as they may judge conducive to the peace, welfare, and good order thereof, and as shall be necessary to restrain drunkenness or disorderly conduct; and such orders and by-laws restraining cattle, horses, sheep, swine, and other animals from going at

[1] *Revised Statutes of Wis.*, 1878, pp. 270–1. In Michigan and Dakota, likewise, money may be appropriated at the town-meeting for the support of a town library: Green, *Townships and Township Officers*, 90–91; Bemis, *Local Govt. in Mich.* etc., 15; *Compiled Statutes of Dakota*, 1887, p. 255.

[2] These, of course, in addition to powers similar to those already enumerated: *Revised Statutes*, I, 808–9. Illinois has similar provisions relating to noxious weeds, pounds, and pound-masters: Starr and Curtis' *Annotated Statutes*, II, 2412.

[3] See above, Chap. I, IV, (*a*).

[4] *Compiled Statutes*, 1887, pp. 316–17. Cf. *Revised Statutes of Wis.*, 1878, pp. 269–71; *Revised Statutes of New York*, I, 808–9; Howell's *Annotated Statutes of Mich.*, 1882, I, p. 240; *Compiled Laws of Dakota*, 1887, p. 176; *Statutes of Minn.*, 1878, p. 170; Starr and Curtis' *Annotated Statutes of Ill.*, II, 2411.

large on the highways, as they may deem proper," and fix penalties for violation of such regulations, "not exceeding ten dollars" for any one instance.[1]

In Nebraska, as elsewhere, the electors possess similar legislative authority. They may also take measures to guard against the destruction of property by prairie fires.[2]

The legislative powers of the western township are, on the whole, less comprehensive than those of the New England town. This, of course, is due partly to the exhaustive character of state legislation, but mainly to the more equal division of functions between the township and the county. Moreover within the prescribed limits the by-laws enacted are, as a rule, relatively less numerous and less varied than in New England for the same class of subjects. In explanation of this difference Dr. Bemis has pointed out the fact "that in the west, that part of the township where the inhabitants are most numerous, the village, and for whose regulation many laws are necessary, is set off as an incorporated village. . . . These villages have the privilege, either directly in village meeting, or more often through a council of . . . trustees, of managing their own local affairs, their police, fire department, streets, and water works. In some states, however, they are considered parts of the township, and as such vote in town-meeting on all questions touching township roads, bridges, the poor, and schools."[3]

In the annual meeting, finally, the township officers are chosen, and the official body is very similar in all the states, though there is some variation in the number and nomenclature.

[1] *Revised Statutes*, 1878, p. 270. The penalty for violation in Michigan and Dakota is ten dollars: Green, *Townships and Township Officers*, 7; *Compiled Laws of Dakota*, 1887, p. 176. In Nebraska it is twenty dollars: *Compiled Statutes*, 1887, p. 316.

[2] *Compiled Statutes*, 1887, p. 317. On the right to enact by-laws see *Compiled Laws of Dakota*, 1887, p. 176; *Statutes of Minn.*, 1878, p. 169; Howell's *Annotated Statutes of Mich.*, 1882, I, p. 241; *Revised Statutes of New York*, I, 809; Starr and Curtis' *Annotated Statutes of Ill.*, II, 2413.

[3] Bemis, *Local Govt. in Mich. and the Northwest*, 15.

In Nebraska, to take a typical example, every township elects annually a supervisor, a clerk, a treasurer, an assessor, three judges and two clerks of election, and one overseer of highways for each road district. Besides these every two years two constables and two justices of the peace are chosen.[1] The functions of the more important officers will now be examined in detail.

IV.—Western Selectmen.

(*a*).—*Differentiated Forms.*

A very interesting example of institutional differentiation is the dual form assumed by the western representative of the

[1] *Compiled Statutes*, 1887, pp. 28, 315, 387. Town officers are chosen as follows in various states:

New York.—One supervisor, one collector, one clerk, four justices, one or two overseers of the poor, one, two, or three commissioners of highways, such number of constables, assessors, and pound-keepers as the electors may determine, and any other officers allowed by existing laws: *Revised Statutes*, I, 808, 810–11.

Pennsylvania.—One clerk, one treasurer, one or more constables, one assessor and two assistant assessors, two, three, or more supervisors, three auditors, two overseers of the poor; also two or more justices chosen for five years: Brightly's Purdon's *Digest*, II, 1637–1640; I, 36, 315–16, 973, 975.

Ohio.—One clerk, one treasurer, one assessor for each election precinct, three trustees, as many constables and road supervisors as the trustees deem sufficient, and as many justices as the county court of common pleas may determine, the number being subject to increase by the probate judge: *Revised Statutes*, 1880, I, 295, 120.

Illinois.—One clerk, one assessor, one collector, one supervisor, who is *ex officio* overseer of the poor: all chosen annually; two justices and two constables, the number subject to increase with increase of population: chosen quadrennially; also pound-masters and highway commissioners: Starr and Curtis' *Annotated Statutes*, II, 2416, 1431.

Michigan.—One supervisor, one treasurer, one school inspector, one highway commissioner, one clerk, who is also *ex officio* school inspector, not to exceed four constables, one overseer of highways for each road district: chosen for one year; also a drain commissioner elected biennially: Howell's *Annotated Statutes*, 1882, I, 241; Green, *Townships and Township Officers*, 28, 212.

New England selectmen. In several states the headship of the town is vested in an official who reminds us of the Rhode Island "head officer" before his functions were absorbed by the town-council.[1] Such is the trustee of Indiana,[2] Missouri,[3] and Kansas,[4] the town chairman of Wisconsin,[5] and the supervisor of New York,[6] Michigan,[7] Illinois,[8] and Nebraska.[9] But it is very important to observe that in every one of these instances, save Indiana, a double headship exists. Side by side with the trustee or supervisor, who has important administrative duties of his own, is found a township board of audit, appeal, or general superintendence of which the former is a

Wisconsin.—One clerk, one treasurer, one assessor (or either two or three if the town board so order); constables, not to exceed three in number, as the town-meeting may determine; one overseer of highways for each road district; one librarian, if a library has been established; three supervisors, one designated on the ballots as chairman; and four justices of the peace, two chosen annually for a term of two years: *Revised Statutes*, 1878, 277.

Minnesota and Dakota.—One clerk, one treasurer, one assessor, one overseer of highways for each road district; three supervisors, one designated on the ballots as chairman: chosen for one year; also two constables and two justices elected biennially; besides pound-masters, when the electors think fit: *Statutes of Minn.*, 1878, pp. 169–70; *Compiled Laws of Dakota*, 1887, p. 175.

Iowa.—One clerk, one assessor, one collector, three trustees, two constables, and two justices: McLain's *Annotated Statutes*, I, 89, 91.

Kansas.—One trustee, one clerk, one treasurer, one road overseer in each district, two justices, and two constables; the number of justices and constables subject to increase by the county board on petition: *Compiled Laws*, 1885, pp. 984, 989.

[1] See Chap. II, v, (*a*).

[2] *Revised Statutes of Indiana*, 1881, p. 1284.

[3] *Township Organization Law*, 9, 18.

[4] *Compiled Laws*, 1885, pp. 984, 986–7; Canfield, *Local Government in Kansas*, 13, 14.

[5] *Revised Statutes*, 1878, pp. 237, 277, 310.

[6] *Revised Statutes*, I, 808, 826, 834.

[7] Howell's *Annotated Statutes*, I, 249; Bemis, *Local Government in Mich.*, etc., 17.

[8] Starr and Curtis' *Annotated Statutes*, II, 2423–7; Shaw, *Local Govt. in Ill.*, 12, 14.

[9] *Compiled Statutes*, 1887, pp. 315, 320.

member by virtue of his office. On the other hand, in several states, the supervising authority is vested wholly in the board. This is the plan adopted by Ohio,[1] Pennsylvania,[2] Iowa,[3] Minnesota,[4] and Dakota.[5]

(*b*).—*The Trustee or Supervisor.*

In states where both a town board and a supervisor exist, the powers of the latter are somewhat limited. In Nebraska, for example, it is his duty to prosecute, in the name of the township or otherwise, for all penalties given the town for its use, when no other officer is specially designated for that purpose; in all legal proceedings against the town, the first process and all other writs are served on him; and he is required to attend to the defence of the suit, when instituted, and report the result of the proceedings to the electors at the next town-meeting.

It is also the duty of the supervisor to attend all meetings of the county board—of which he is a member—and lay before it a statement, delivered to him by the town clerk, of all moneys to be raised by taxation in his town; to receive all accounts against the township and lay them before the town board at its regular meetings; to keep a just and true record of the receipt and disbursement of all public moneys coming into his hands, and to render account thereof to the town board on the Tuesday preceding the annual town-meeting. The supervisor is *ex officio* overseer of the poor, which office is discharged by

[1] *Revised Statutes*, 1880, I, 295 ff.

[2] However in Pennsylvania there is a sort of double headship: the accounts of the board of supervisors are passed upon by a second body—the board of three auditors, elected in the same manner as the former: Brightly's Purdon's *Digest*, II, 1637–8, 1641; Gould, *Local Govt. in Pa.*, 33.

[3] Macy, *A Govt. Text Book for Iowa Schools*, 21; McLain's *Annotated Statutes*, I, 89.

[4] *Statutes*, 1878, p. 169.

[5] *Compiled Laws*, 1887, pp. 175, 183.

the justices of the peace in each precinct, when the county has not adopted town organization. As compensation the supervisor receives two dollars for each day actually employed,[1] and is liable to a forfeiture of fifty dollars for refusal or neglect to perform any duty of his office. Supervisors elected in wards of cities of the first and second class and "assistant supervisors" discharge none of the functions of town supervisors, save as members of the county board.[2]

Similar powers are possessed by the supervisor in all states where the double headship and the town-meeting coexist, but, of course, with numerous differences in detail. In Michigan, for instance, the supervisor as *ex officio* assessor takes the valuation of property and submits it to the county board for approval; apportions the amount required for the town expenses among the inhabitants on the basis of the corrected valuation; and delivers the tax-lists to the county treasurer for collection.[3] He is also required by law to take the census of persons and statistics every tenth year;[4] report annually to the county clerk the number of births, deaths, and marriages in the township;[5] provide temporary relief for the poor; report violations of the liquor law; inspect dams, and see to the maintenance of shutes for fish.[6]

In New York the supervisor, besides discharging his ordinary duties,[7] is *ex officio* water commissioner,[8] guardian of orphans for the purpose of binding them out,[9] and member of the board for registration of voters.[10] He is also required by law to

[1] In Missouri the fee is $1.50 per day: *Township Organization Law*, 20; the same in Michigan: Howell's *Annotated Statutes*, I, 257.

[2] *Compiled Statutes*, 1887, pp. 319–20, 322.

[3] Bemis, *Local Govt. in Mich.*, etc., 17; Howell's *Annotated Statutes*, I, 249.

[4] Howell's *Annotated Statutes*, I, 267 ff.

[5] Howell's *Annotated Statutes*, 1, 276 ff.

[6] Bemis, *Local Government in Mich.*, etc., 17.

[7] *Revised Statutes*, I, 826.

[8] *Revised Statutes*, III, 2455.

[9] *Revised Statutes*, III, 1892.

[10] *Revised Statutes*, I, 421.

survey the boundaries of his township when so directed by the surveyor general,[1] approve the official bonds of justices and commissioners of highways,[2] send deaf and dumb persons between the ages of six and twelve to the institution for deaf mutes,[3] order out so many of the inhabitants liable to road service as he shall deem sufficient to assist in extinguishing forest fires,[4] administer oaths,[5] and aid the town clerk in preparing the record of soldiers.[6]

Where the town-meeting does not exist the head officer, like the town board, possesses relatively greater power. Thus, in Missouri, the trustee, as *ex officio* treasurer and collector, has charge of the entire financial administration of the town subject to the audit of the township board.[7] In Kansas, the trustee may divide his township into road districts, make such alterations in the same as he thinks fit, cause a record to be made of their boundaries and of the number of road overseers, and fill vacancies in the last named office; see that road moneys be properly applied, have the care and management of all property real and personal, and exercise general control of the financial affairs of the township. Besides he is *ex officio* judge of elections and overseer of the poor; and may, with the approval of the county commissioners, levy taxes for township purposes.[8] Similar powers are possessed by the trustee in Indiana, but since in that state the headship of the town is not shared with a township board, his functions are still more numerous, comprehending practically all of the administrative business of the community.[9]

[1] *Revised Statutes*, I, 827.
[2] *Revised Statutes*, I, 844, 821.
[3] *Revised Statutes*, III, 1945.
[4] *Revised Statutes*, III, 2086.
[5] *Revised Statutes*, I, 829.
[6] *Revised Statutes*, I, 800.
[7] *Township Org. Law*, 14–16.
[8] *Compiled Laws*, 1885, pp. 986–87.
[9] *Revised Statutes*, 1881: see Index at *Township Trustee.*

(*c*).—*The Town Board.*

The town board is variously constituted in different states. In New York, Illinois, Michigan, and Nebraska, it is composed of the supervisor, clerk, and justices of the peace;[1] in Pennsylvania, of two or more supervisors;[2] in Iowa and Ohio, of three trustees;[3] in Minnesota, Wisconsin, and Dakota, of three supervisors;[4] and in Kansas of the trustee, clerk, and treasurer.[5]

The powers of the board, among the different states, are still more varied than its forms. In almost every instance[6] its primary duty is to audit the accounts of the town officers and pass upon all claims or charges against the town. For this purpose, in Nebraska, the board is required to meet at least thrice a year in the office of the clerk; and the accounts so audited, together with the certificates of the board, must be filed for public inspection with the clerk, who must produce and read them at the next annual town-meeting.[7]

Similar powers, though in some cases, more numerous and important, are possessed by the town board in Dakota, Minnesota, Michigan,[8] New York, and Illinois; while in Wisconsin and, more especially, in Ohio its administrative functions are unusually comprehensive, particularly those prescribed by

[1] *Revised Statutes of New York*, I, 834; Starr and Curtis' *Annotated Statutes of Ill.*, II, 2427; Howell's *Annotated Statutes of Mich.*, 1882, I, p. 251; Bemis, *Local Govt. in Mich.*, etc., 17; *Compiled Statutes of Nebraska*, 1887, p. 320.

[2] Brightly's Purdon's *Digest*, II, 1637–8; Gould, *Local Govt. in Pa.*, 33.

[3] McLain's *Annotated Statutes of Iowa*, I, 89; *Revised Statutes of Ohio*, 1886, I, 294–5.

[4] *Statutes of Minnesota*, 1878, p. 169; *Revised Statutes of Wisconsin*, 1878, p. 277; *Compiled Laws of Dakota*, 1887, p. 175.

[5] *Compiled Laws*, 1885, p. 987.

[6] Save in Pennsylvania where there is a separate auditing board: Brightly's Purdon's *Digest*, II, 1637.

[7] *Compiled Statutes of Nebraska*, 1887, p. 320.

[8] Bemis, *Local Govt. in Mich.*, etc., 17.

special legislative enactment.[1] Moreover it is worthy of remark that in several states a limited power of local taxation is vested in it by law.[2]

V.—Various Township Officers and Their Duties.

(*a*).—*The Clerk.*

The functions of the western town clerk are similar to those performed by that officer in New England, though they are perhaps less numerous and important. Besides acting as *ex officio* secretary of the town-meeting, he is the custodian of all town records and legal documents. In Nebraska the clerk may also administer the oath to all town officers, and whenever necessary in the transaction of township business. He is further required, before any regular meeting of the county board, to deliver to the supervisor certified copies of all entries of votes for raising money; to give notice of town-meetings, and post or otherwise publish town by-laws and regulations; and he is *ex officio* member of the town board. Before entering upon the duties of his office, he is required to give a bond of five hundred dollars, and he receives as compensation two dollars a day for the time actually employed in the public service.[3]

Similar provisions relative to the town clerk exist in most of the states;[4] but in some instances more numerous duties

[1] *Revised Statutes of Wis.*, 1878: Index at *Town Supervisors; Revised Statutes of Ohio*, 1886, I, 296 ff., and Index.

[2] So, in Michigan, the board may levy a tax for the ordinary town expenses, when the electors have refused or neglected to do so: Howell's *Annotated Statutes*, 1882, I, p. 252; in Ohio it may levy a tax to defray cost of grounds for cemeteries: *Revised Statutes*, 1881, I, 299; in Kansas, to liquidate bonds or pay interest thereon: *Compiled Laws*, 1885, p. 992.

[3] *Compiled Statutes*, 1887, pp. 320–1, 94.

[4] *Township Org. Law of Mo.*, 16–17; *Statutes of Minn.*, 1878, pp. 176–7; Howell's *Annotated Statutes of Mich.*, I, 250; *Compiled Laws of Kansas*, 1885, p. 988; *Revised Statutes of Ohio*, 1886, I, 305–6; *Compiled Laws of Dakota*, 1887, p. 184.

are imposed upon him by special enactment. Thus in Wisconsin, he may issue licenses to peddlers and auctioneers; take the census; give notice of elections; record orders for laying town drains; register the establishment of division fences; file chattel mortgages, and appraisals of strays and lost goods; record marks and brands and the deeds of pews; attest liquor licenses, and perform multifarious other duties of a secretarial nature.[1]

(*b*).—*The Treasurer.*

The treasurer is, of course, the custodian of the town funds, and he is required to execute a bond as security for the proper disposal of the money coming into his hands.[2] The routine of the office may be illustrated by the following extracts from the Nebraska statutes:

"Orders for the payment of money shall be drawn on the town treasurer, and signed by the town clerk, and countersigned by the supervisor. All claims and charges against the town duly audited and allowed by the town board, shall be paid by orders so drawn. No order shall be drawn on the town treasurer in excess of seventy-five per cent. of the amount of taxes levied for the current year on the property of said town, subject to be expended by said town, unless the money is in the treasury . . . to pay the order . . . on presentation. When any order . . . is presented to the town treasurer for payment, and is not paid for want of funds," the treasurer shall note in his book of registration "the fact of presentation and non-payment . . . , and said order shall draw interest at seven per cent. per annum from the date of presentation, until there are funds sufficient in the hands of said treasurer to pay

[1] *Revised Statutes*, 1878, pp. 474, 476, 329, 61, 78, 420, 430, 655, 644, 482–3. See Index at *Town Clerk*.

[2] In Nebraska the amount of the bond is 5000 dollars or "double the amount of money that may come into his hands, to be fixed by the town board:" *Compiled Statutes*, 1887, pp. 94, 319.

the same, after paying all orders drawn against such tax levy presented prior thereto, and said orders shall be paid in the order of their presentation and registration."

The treasurer is also *ex officio* collector of all taxes, whether for state, county, or town purposes. And it is the duty of the county clerk to transmit to him a duplicate of the tax-list of his township, with a warrant for the collection attached, and a "tax receipt book, with a blank margin or stub, upon which the said township collector shall enter the number and date of the tax receipt given to each tax payer, the amount of tax and by whom paid," and return the receipt book to the county clerk. It is also the duty of the collector, every thirty days, to render to the county treasurer a statement of the amount and kind of taxes collected, together with all moneys so collected for other than town purposes, and to make final settlement on or before the first day of January in each year. He is likewise required to execute a bond "with two or more securities to be approved by the county clerk, in double the amount of taxes to be collected."[1]

(*c*).—*The Constable and the Justice of the Peace.*

As a rule in the western states two justices and two constables are elected in each precinct or township; the former usually, and sometimes the latter, being chosen for two or more years.

The justice is at once a conservator of the peace and a magistrate invested with both criminal and civil jurisdiction, each carefully limited by the statutes. In another important

[1] *Compiled Statutes*, 1887, pp. 319, 321, 601–4.

In Missouri the town trustee is *ex officio* collector and treasurer, with the usual duties: *Township Org. Law*, 9, 15, 16. Cf. *Statutes of Minn.*, 1878, pp. 177–8; Howell's *Annotated Statutes of Mich.*, 1882, I, pp. 252–4; *Compiled Laws of Kansas*, 988; *Revised Statutes of Ohio*, 1886, I, 305–6; *Revised Statutes of Wisconsin*, 1878, pp. 277–83 and Index; *Compiled Laws of Dakota*, 1887, pp. 185–6.

particular the ancient character of the office is maintained: every justice being both county and township officer. In England the magistrate, though appointed by the royal commission for the entire county, has always, out of quarter sessions, confined his activity largely to the neighborhood where he chanced to reside. In the West, and indeed generally throughout the United States, this custom has been transformed into a legal requirement, justices being chosen in the township or precinct, but exercising jurisdiction throughout the shire.

The constable is a local police officer and the ministerial agent of the justice's court. While he does not enjoy the prestige, nor perhaps the rank, anciently accorded him as head of the parish, nevertheless his functions as peace magistrate are still indispensable to the community. His office, as well as that of the justice of the peace, will be treated elsewhere more in detail.[1]

VI.—The Assessor.

(*a*).—*Evolution of the Office.*

The assessor of property for purposes of taxation is not a primitive English institution, for the simple reason that originally no taxes were levied. All branches of government, state or local, were supported by services or voluntary contributions. And such services—for instance those constituting the *trinoda necessitas*[2]—were probably rendered under the superintendence of the local reeves and tithingmen, just as the *feorm-fultum*,[3]

[1] In the second volume.

[2] On the *trinoda necessitas* see the Sec. VIII below.

[3] The *feorm-fultum* originated doubtless in voluntary gifts; but it appears later as identical with the *cyninges-gafol* or *cyninges-feorm*, a rent from the folc-land for support of the king, made compulsory and dealt with by the witan. For a good discussion of the growth of the principle of taxation in the Saxon period, see Lodge, *The Anglo-Saxon Land Law, Essays*, 60 ff. Cf. Stubbs, *Const. Hist.*, II, 536. Kemble, *Saxons*, II, 30, 31, 223–4, erroneously regards the *cyninges-gafol* as a regular tax levied by the witan.

or payment in kind for the support of the royal household, was gotten in by the reeves of the king.[1]

But, except in the case of the Danegeld[2] and the fumage[3] or hearth tax, no public taxes properly so called were levied in England before the Conquest.

The word *assessor* is of Roman origin meaning an assistant judge;[4] and in this sense it is also used in the judicial history of France.[5] Moreover it is remarkable that the prototype of the English fiscal officer of that name must be sought in the jury of the vicinage.

In the period immediately following the Norman Conquest, assessments for the support of the national government were

[1] "This then is the alleviation which it is my will to secure to all the people of that which they before this were too much oppressed with. That then is first: that I command all my reeves that they justly provide on my own, and maintain me therewith; and that no man need give them anything as 'feorm-fultum,' unless he himself be willing:" Canute, *Secular Laws*, 70: Thorpe, *Anc. Laws*, I, 413; Schmid, *Gesetze*, 306, 308. The reeves were also required to render to the church the king's tithes, payable in kind: Aethelstan I., *Proem:* Thorpe, *Anc. Laws*, I, 195.

There appears to be little positive proof in the laws of the conjecture of the text that services, such as building bridges, roads, etc., were superintended by the local reeves; but it is highly probable. The collection of tolls seems to have been entrusted in part to the *tungerefa:* Aethelred, IV, 3: Schmid, *Gesetze*, 219. So also fasts were enforced and the penalties collected by the local reeves: Aethelred, VII, 2, § 5: Schmid, *Gesetze*, 240. It is also noticeable that the presbyter, the reeve of the hundred, and the manorial bailiff appear as assessors in the Domesday Survey: Ellis, *Int. to Domesday*, I, 21.

[2] Stubbs, *Const. Hist.*, I, 105, 133. Cf. Lodge, *Anglo-Saxon Land Law*, *Essays*, 68.

[3] Dowell, *Hist. of Taxation* and *Taxes*, I, 10.

[4] From *assidere*, "to sit beside," from which word *assize* is also derived. 'Assess' and 'assessment' are classed by Skeat as "coined words." The first English assessors of property were *assizers*—sworn inquisitors. See Skeat, *Etymolog. Dict.*, at *assess* and *assize;* Stubbs, *Select Charters*, glossary at *assisus;* Pauly, *Real-Encyclopädie*, I, 1883; Smith, *Dict. of Greek and Roman Ant.*, 143; Arnold, *Roman Provincial Administration*, 114.

[5] Warnkoenig and Stein, *Französ. Staatsgesch.*, I, 433, 576–7; III, 454. It is similarly used in Scotland: Bohn, *Pol. Cyclopaedia*, I, at *Assessor.*

made by commissioners of the exchequer assisted by sworn inquisitors or recognitors of the neighborhood where the property lay.[1] In this way was compiled the celebrated Domesday Book, which has been characterized as the "first step in a continuous process by which the nation arrived ultimately at the power of taxing itself, and thus controlling the whole framework of the constitution and the whole policy of the government."[2] In this instance, general inquisitors, called "justiciaries" or "legati" of the king, were appointed for the whole realm.[3]

"The Inquisitors, it appears, upon the oaths of the sheriffs, the lords of each manor, the presbyters of every church, the reves of every hundred, the bailiffs and six villans of every village, were to enquire into the name of the place, who held it in the time of King Edward, who was the present possessor, how many hides in the manor, how many carucates in demesne, how many homagers, how many villans, how many cotarii, how many servi, what free-men, how many tenants in socage, what quantity of wood, how much meadow and pasture, what mills and fish-ponds, how much added or taken away, what the gross value in King Edward's time, what the present value, and how much each free-man or soch-man had or has. All this was to be triply estimated: first as the estate was held in the time of the Confessor; then as it was bestowed by King William; and thirdly, as its value stood at the formation of the survey. The jurors were moreover to state whether any advance could be made in the value."[4]

Such is the character of the earliest English assessment list which has been preserved. And this appraisement remained the basis of the land tax—the only form of taxation in that

[1] Forsyth, *Trial by Jury*, 83 ff.; Stubbs, *Const. Hist.*, I, 584–7, 385–6, 611–15.

[2] Stubbs, *Const. Hist.*, I, 385.

[3] Many of their names are preserved: Ellis, *Introduction to Domesday*, I, 18.

[4] "Such are the exact terms of an inquisition in the counties of Cambridge and Hertford:" Ellis, *Introduction to Domesday*, I, 21–2.

age—until the reign of Henry II.[1] But that monarch made the knight's fee,[2] instead of the hide, the area for the assessment of scutage on the tenants in chief, and therefore the old valuation was no longer serviceable. "Hence, when he was preparing to levy the aid pour fille marier, the king issued a writ to all the tenants in chief of the crown, lay and clerical, directing each of them to send in a cartel or report of the number of knight's fees for the service of which he was legally liable."[3] The scutage, or tax paid in commutation of military services, long continued to be exacted on the basis of this assessment; and so each tenant in capite became practically his own assessor.[4]

In other cases, such as the laying of the tallage on the demesne boroughs, either the individual taxpayer made his own return under oath, or the itinerant justices acted as assessors. According to the one method, the levy became a "voluntary contribution" and the government was helpless; according to the other, the taxpayer was placed at the mercy of strangers.[5] On the other hand, when taxation of movables began, a return was made to the early mode of assessment by means of a jury of the neighborhood. Thus in 1181 was assessed the value of rents and chattels for the Assize of Arms; as also the Saladin tithe in 1188.[6] Ten years later the same method was applied to the carucage.[7] In this instance the assessment was

[1] Except in boroughs: Stubbs, *Const. Hist.* I, 584; *Dialogus de Scaccario*, I, c. 16: *Select Charters*, 208.

[2] The knight's fee was a quantity of land worth twenty pounds a year: Stubbs, *Const. Hist.* I, 265; Dowell, *Hist. of Taxation and Taxes*, 1, 20.

[3] Stubbs, *Const. Hist.* I, 584, 581. This assessment was made about 1166: *Select Charters*, 146; but Henry seems to have levied a scutage in 1159: Dowell, *Hist. of Taxation*, I, 40.

[4] Dowell, *Hist. of Taxation*, I, 44; Stubbs, *Const. Hist.*, I, 585.

[5] Stubbs, *Const. Hist.*, I, 585.

[6] Stubbs, *Const. Hist.*, I, 586; Dowell, *Hist. of Taxation*, I, 60.

[7] The carucage was a tax laid on the carucate, which was adopted as the area of assessment in 1194, and fixed at 100 acres in 1198: Dowell, *Hist. of Taxation*, I, 36, 37. According to the hitherto accepted view, carucata

made in every shire by two royal commissioners, together with the sheriff and knights chosen for the purpose, and sworn for faithful performance of their duties; who "summoned before them the stewards of the barons, and in every township, the lord or bailiff and the reeve and four men, free or villein, and two knights for every hundred in the county," and these took oath to state correctly the number of carucates in every township and assess the tax accordingly.[1]

An important epoch in the history of taxation is reached when elective assessors first make their appearance. Thus in 1220 the sheriffs were required to cause two lawful knights to be chosen in full county court, to take part in the assessment and collection of the carucage.[2] In 1225, again, the assessment and collection of the fifteenth "were entrusted to four elected knights of each hundred, who enquired by jury into all disputed cases." In 1232 the reeve and four best men of each township acted as assessors in the presence of knights assigned; and similarly in 1237 the thirtieth of movables was assessed, in the presence of four knights and a clerk assigned for each shire, by four elected freemen of every township.[3] Again in 1297, it was enacted that four men should be chosen in every parish, who should "return the assessment of the parish to the shire authorities;" and to prevent any unjust

originally meant the quantity of land that could be ploughed in a season by a caruca, or full team of eight oxen: Dowell, *Hist. of Taxation*, I, 35; Stubbs, *Select Charters*, 536. But the *Carucata terra ad geldum*, like the hide, was variable in extent, and should be distinguished from the true areal ploughland, the *terra ad unam carucam*, whose normal capacity was 120 acres, and which is also called in Domesday *terra unius carucae*, or *terra quam potest arare una caruca*. Cf., however, the various theories of Eyton, *Domesday Studies*, I, 11, 28-9; Pell, *A New View of the Geldable Unit of Assessment of Domesday*, *Domesday Studies*, I, 319 ff.; Round, *Notes on Domesday Measures of Land*, *Domesday Studies*, I, 189 ff.; Taylor, *The Ploughland and the Plough*, *Domesday Studies*, I, 144 ff.; Seebohm, *Village Communities*, 40 ff., 85, 62, 74, 123.

[1] Dowell, *Hist. of Taxation*, I, 36.

[2] Stubbs, *Const. Hist.*, II, 213; Dowell, *Hist. of Taxation*, I, 37.

[3] Dowell, *Hist. of Taxation*, I, 66–7; Stubbs, *Const. Hist.*, II, 213.

discrimination, it was further required that the authorities of the shire should "afterwards go from hundred to hundred and from parish to parish to hear every complaint and correct any errors in the assessment."[1] Finally in 1306 it was ordered that "a jury of twelve men for each hundred shall deliver to the assessors of each shire their assessment," and the twelve are to do this through the oath of four men elected in every parish.[2]

At the beginning of the fourteenth century, therefore, the apportionment of the state taxes was placed, where it should be placed,—in the hands of the people of each neighborhood.[3]

[1] Toulmin Smith, *The Parish*, 16–17.

[2] Toulmin Smith, *The Parish*, 17.

[3] It may be well to epitomize here Mr. Dowell's statement of the procedure in the levy and assessment of taxes on movables, that is to say, of the tenths, twelfths, thirtieths, and similar rates:

The "ordinance" authorizing the assessment was in the form of a royal ordinance. "It recited that the commissioners for the county were not to be persons belonging to the county or having land there."

"A writ was issued for every county. This writ, addressed to the knights, freemen, and whole community of the county, recited the grant and the appointment of two knights as commissioners to assess and collect the tax according to the form contained in a roll delivered to them, and ended with a direction to assist the commissioners."

The commissioners were required to see to the election of the township assessors, who were sworn to assess all goods in the house, field, or elsewhere, fairly at their full value.

The schedule of assessment, containing the name of every taxpayer and the amount with which he was charged, was made out in duplicate, one copy for the barons of the exchequer and one for the commissioners.

If necessary a "good and lawful person" was sent by the king into each shire to see if the assessment had been properly made and that no one had suffered unjust treatment at the hands of the king's officers.

Two schedules of assessment for the borough of Colchester, dated respectively 1295 and 1301, show that the taxation of movables was very comprehensive when strictly enforced. "Every beast of the plough, ox, cow, calf, sheep, lamb, pig, and horse and cart; every quarter of wheat, barley, and oats, haystack, and woodstack; and all the little stock-in-trade of the local sea-coal dealer, pepperer, mustarder, spicer, butcher, fisherman, brewer, and

The year 1334 marks a memorable era in the history of English taxation. For more than a century the custom had been growing of laying the direct tax on movables in the form of a fractional part of their appraised value; and in the early period the rate varied from one fortieth to a fourth.[1] But in the year mentioned a 'fifteenth and a tenth' was established as a rate-unit, and thereafter taxes were levied in multiples or fractions of that rate. Moreover, to obviate the opportunity for extortion in the assessment, the royal tax commissioners were instructed to treat with the various cities, boroughs, and townships, and "settle with them a fine to be paid as a compensation for the fifteenth and the tenth. The sum thus fixed was to be entered on the rolls as the assessment of the particular township." Henceforth the sum fixed by composition for the fifteenth and tenth granted in 1334, was accepted as the basis of taxation. That is to say, the nominal rate of a fifteenth and a tenth was converted into a fixed sum of about 39,000*l.*; and thereafter a 'fifteenth and a tenth' was practically a fiscal expression for a sum of that amount.[2] In 1334 royal commissioners to supervise the levy and collection of the tax were appointed for each county as hitherto; and in each town freemen elected for the purpose acted as assessors. But afterwards the provisions of the ordinance of assessment were not strictly

wine seller, tanner, skinner, shoemaker, fuller, weaver, dyer, linendraper, girdler, glover and taselerer, tiler, glazier (verrer), carpenter, cooper, ironmonger, smith, potter, and bowyer, are included."

"The following articles were to be exempted:—1. In counties—the armour, riding horses, jewels and clothes of knights and gentlemen and their wives, and their vessels of gold, silver, and brass. 2. In cities, boroughs, and market towns: A suit of clothes for every man and another for his wife, a bed for both of them, a ring and a buckle of gold or silver, a girdle of silk in ordinary use by them, and a cup of silver or mazer from which they drink. 3. Everywhere, the goods of any person not amounting in the whole to 5*s.* in value:" *Hist. of Taxation*, I, 70–74.

[1] Dowell, *Hist. of Taxation*, I, 59 ff.

[2] I have here merely summarized the words of Dowell, *Hist. of Taxation*, I, 86–7.

observed, each community being allowed to apportion its quota of the fixed sum as it saw fit.[1]

It is remarkable that this form of taxation, in spite of various attempts at innovation, was maintained until the Revolution; except that during the Tudor reigns it became customary to supplement the regular fifteenths and tenths by so-called 'subsidies;' and these were assessed by persons nominated by royal commissioners.[2]

During the Commonwealth a system of monthly assessments was adopted. "A sum was fixed, according to the exigencies of the occasion, as the whole monthly assessment for England and Wales, or Scotland, or Ireland, as the case might be." It was then apportioned among the various counties and towns and assessed on the taxpayers by the local authority under supervision of commissioners named in the ordinance.[3] And this form of assessment was occasionally used after the Revolution.[4]

We reach another important date in the history of central taxation in 1792. In that year a rate on lands and movables was tried instead of the usual levy by stated sums. But in 1797 an act of Parliament fixed the amount which a certain rate should produce. A rate of one shilling in the pound, for example, was to yield a half million pounds in round numbers. Henceforth, after 1797, a rate of so many shillings in the pound, just as after 1334 a rate of so many fifteenth and tenths, meant simply a fixed sum; and it was uniformly apportioned among the counties on the basis of the assessment of 1792. Moreover, although the tax was intended to fall on income from goods, merchandise, and personal property, as well as on land, it soon became practically a land tax; and this is

[1] Dowell, *Hist. of Taxation*, I, 87, 238.

[2] Dowell, *Hist. of Taxation*, I, 151 ff. The taxation of the 'subsidy men' was most arbitrary and capricious: *Ib.*, II, 5.

[3] Dowell, *Hist. of Taxation*, II, 4–5.

[4] Dowell, *Hist. of Taxation*, II, 30.

precisely what occurred in the case of the old fifteenths and tenths and the Tudor subsidies.[1]

On the occasion of the new levy of 1792, an important innovation in the mode of assessment appears, in the creation of county boards of tax commissioners. These boards, which have survived to our own times, are nominated in Parliament and comprise the principal landed gentry of the respective shires, including the majority if not all of the justices of the peace. By each county board—which is thus practically identical with the court of quarter sessions[2]—local assessors and collectors are appointed.[3]

The assessment of the "income and property tax," since 1842, is managed in a similar way. A committee is appointed by the land tax commissioner of each county, consisting usually of three to seven of its members, supplemented by other members chosen from the resident taxpayers by co-optation. By the body thus constituted, on the nomination of the vestry, one or more assessors for each parish are appointed.[4]

With respect to local taxation, the parish has ever been remarkably independent. The vestry is the "original assessor;"[5] but the work of assessment has always been performed by the parish officers. The church rate has thus been assessed by the churchwardens; the poor rate, by the overseers of the poor;[6] and the highway rate, by the surveyors of highways.[7] But a

[1] Gneist, *Selfgovernment* (1871), 554 ff.; Dowell, *Hist. of Taxation*, II, 48–50, 97, 118.

[2] Or the common council, aldermen, mayor, etc., in cities and boroughs: Gneist, *Selfgov.* (1871), 555.

[3] Gneist, *Selfgov.* (1871), 556; Toulmin Smith, *The Parish*, 610–12, 489–91.

[4] Gneist, (1871), 560 ff. The so-called "assessed taxes" are similarly managed by a county commission identical in membership with the land tax commission: *Ib.*, 558.

[5] Toulmin Smith, *The Parish*, 562.

[6] Phillips, *Local Taxation in England and Wales*, 473, 490.

[7] On these officers as assessors see Gneist, *Selfgovernment*, II, 65 ff., 100 ff., 647, 663, 685, 796, 789, 622; edition of 1871, 565 ff.; Toulmin Smith, *The Parish*, 560, 566 ff., 576 ff., 595.

special officer bearing the name of assessor is not elected in the parish. And it should also be noted that in England only real property is assessed for local purposes.[1]

At present the poor rate constitutes the great burden of local taxation. The valuation is still taken by the parish overseer, but subject to the revision of the "assessment committee," appointed by the guardians of the union in which the parish is situated.[2] The county rate is "tacked" to the poor rate and collected usually as a part of it.[3] "The county, however, is not bound by the parochial valuation; it makes its rate on parishes and not on individuals; and, subject to the right of appeal on the part of the parish, may raise or diminish the rateable value of the parish."[4]

The English system of local taxation is exceedingly complex and confusing, presenting in this respect a great contrast to the simple methods prevailing generally in the United States. There are several different assessments managed by distinct authorities for diverse areas; and, besides, the incidence of taxation is not the same in all cases. To remedy the glaring defects of the fiscal system is one of the benefits anxiously sought in every project for local government reform in Great Britain.[5]

[1] Phillips, *Local Taxation in England and Wales*, 502.

[2] The union assessment committees were established in 1863: Phillips, *Local Taxation in England and Wales*, 489; Gneist, (1871), 574.

[3] The expenses for highways are also usually defrayed from the poor rate Gneist, (1871), 576.

[4] Thring, *Local Government*, in *Nineteenth Century*, March, 1888, p. 436.

[5] Phillips, *Local Taxation in England and Wales*, 465 ff., 487 ff. For a discussion of the present (1888) Local Government Bill see *Westminster Review*, May and July, 1888; Freeman, *The House of Lords and the County Councils*, in *Fort. Rev.*, May, 1888; Goodnow, in *Pol. Sc. Quart.*, June, 1888; *Quart. Rev.*, July, 1888.

(*b*).—*Rise of the Assessor in the American Colonies.*

In New England all taxes of whatever description—whether county, country, or town rates—were assessed by the township officers.[1] With respect to the town and county rates, the selectmen, like the parish vestry, may be regarded as the "original assessor;" but distinct officers were sometimes chosen.[2] Thus in Boston, previous to 1694, this business was entrusted entirely to the selectmen;[3] but in that year it was decided by the town-meeting that seven assessors should be elected.[4]

Special provision was made by the Massachusetts general court for the assessment of the public rates. It was enacted that the selectmen of each town, together with a "commissioner" chosen for the purpose, should apportion the colonial tax; and the commissioners of the various towns of the county, assembled in the shire town, were constituted a board of equalization.[5]

A change was made in 1700, when an elaborate act for the regulation of assessments appeared, providing that, in every town, "three, five, seven, or nine meet persons to be assessors" of public taxes, should be annually chosen by the "freeholders and other inhabitants." However, in case of failure on the part of the town to choose such assessors, the selectmen were

[1] For a more extended notice of New England fiscal administration, see Chap. VII, III.

[2] "Raters" were elected in Dorchester: *Town Records*, 35, 268, etc.; also in Salem: *Town Records*, 77; and in Plymouth jurisdiction: *Col. Records*, XI, 42, 89.

"Listers for the estates of men" were chosen in New Haven: Levermore, *Republic of New Haven*, 159.

[3] See for example *Boston Town Records*, 1634–60, p. 65.

[4] *Boston Town Records*, 1660–1701, p. 219.

[5] So during the seventeenth century: *Mass. Col. Rec.*, II, 174, 212–13; IV, Pt. II, 363; *Boston Town Records*, 1634–60, p. 156; 1660–1701, p. 140; *Salem Town Records*, 217.

to officiate;[1] and the town records show that, in some instances at least, the same men were regularly elected to both offices.[2]

In 1707, it was further enacted that the "assessors distinct from the selectmen" elected annually to assess the public rate, should also apportion the town and county charges[3]—a practice long before adopted in the Plymouth jurisdiction.[4]

Taxpayers were required by law to bring in to the assessors, after public notice, "true and perfects lists of their polls and rateable estates;" but in case of refusal, or if false lists were submitted, the assessors were empowered to make the valuation according to their "sound judgment and discretion."[5]

For many years after the first settlement of Massachusetts taxes were payable in kind. This led to the unique expedient of requiring committees of appraisement to be elected in each town, whose duty it was to fix the valuation of animals or produce, offered in payment of rates; but sometimes a general schedule of values was prescribed in the statutes, or the determination of prices, in case of disagreement, was left to arbiters.[6]

By the code of the Duke of York all assessments were to be made by the constable and overseers of each parish, subject to revision by the high sheriff and appeal to the justices.[7] Subsequently, under the Province laws of New York each township, precinct, and manor was empowered to elect annually two assessors, who should assess all taxes, public and local.[8] Likewise in New Jersey, taxes were assessed by officers elected in each township.[9] In Pennsylvania, on the other hand—except

[1] *Acts and Resolves*, I, 407–12.

[2] See, for example, *Worcester Town Records*, 1740–1753, p. 92; 1753–1783, pp. 9, 34, 87.

[3] *Acts and Resolves*, I, 606.

[4] *Plymouth Col. Rec.*, XI, 42, 89.

[5] *Acts and Resolves*, II, 22, 1034, etc.

[6] *Mass. Col. Rec.*, I, 295, 303, 340, etc. See also Chap. VII.

[7] *Duke of York's Laws*, 9, 48.

[8] Van Schaack, *Laws of New York*, 1691–1773, I, 54; II, 574, etc.

[9] *Newark Town Records*, 99, 140, 141, etc. See Chap. VIII, 11, (*b*), for the early period.

for the brief period when the Duke's laws were in force—the entire local fiscal administration was vested in the county authorities.[1]

The county court in Virginia, had control of the whole financial business of the shire. After a period of experimentation, a mode of assessment was finally adopted which was retained throughout the colonial era. Every county was divided into "precincts" to each of which a justice was assigned by the county court. To these justices the heads of families residing in each precinct were required to bring in correct lists of the tithables for which each was responsible—a rate on polls being the only form of taxation in Virginia.[2]

In Maryland the ancient function of the hundred as an area for rating was restored. The list of taxables for the county levy was taken by the constable of each hundred and returned to the county court for record, while another list was delivered to the sheriff for collection.[3] Public taxes were assessed by a "commission" for the entire colony composed of one or more assessors elected in each hundred, or in each county not yet subdivided.[4] In Delaware, likewise, the lists of taxables were taken by the constable of the hundred; but an 'assessor' was also chosen, who acted as member of the levy court of the county.[5]

(*c*).—*The Western Assessor.*

Throughout the western states the assessor is an elective precinct or town officer;[6] and, usually, all taxes, state or

[1] For a detailed discussion of this subject see Chap. VIII, III, (*d*).

[2] See Chap. IX, IV.

[3] See Bacon, *Laws of Maryland*, 1715, Chap. XV.

[4] Wilhelm, *Local Institutions of Maryland*, 47–48. See Chap. V, IV, (*b*).

[5] See Chap. V, IV, (*c*).

[6] So in Ohio: *Revised Statutes*, 1880, I, 295; Pennsylvania: Brightly's Purdon's *Digest*, II, 1637; New York: *Revised Statutes*, I, 808; Illinois: Starr and Curtis' *Annotated Statutes*, II, 2416; Iowa: McLain's *Annotated Statutes*, I, 89; Minnesota, *Statutes*, 169; Wisconsin: *Revised Statutes*, 1878,

local, are assessed by him. The procedure observed in the performance of his duties as defined by the Nebraska statutes, may be taken as typical of that which prevails throughout the west.

It is the duty of the county clerk "to make up for the several townships or precincts of his county, in books to be provided for that purpose by the auditor of public accounts, the lists of lots and lands to be assessed;" and such books shall also contain sufficient space, with proper columns for the personal property to be listed.

"There shall be held annually on the third Tuesday of March, at the office of the county clerk . . . , a meeting of the assessors of the . . . county for the purpose of consultation in regard to the value of various kinds and classes of property to be by them assessed." At this meeting the assessment books and all necessary blanks are delivered to each assessor by the county clerk. Failure to attend the meeting and to receive such books and blanks is to be regarded as sufficient reason for declaring the office of any assessor vacant and for appointing a successor.

The assessor may appoint one or more deputies and assign to them such districts as he shall deem proper.

Realty must be assessed, by actual view, at some time between the first day of April and the first day of June of each year; and it is listed to the persons owning the same, or their agents, on the first day of April, including all property purchased on that day.

Personal property must be assessed annually during the same period. The assessor "shall call at the office, place of doing business, or residence of each person" liable to taxation,

pp. 277, 338; Dakota, *Compiled Laws*, 1887, p. 175; Nebraska, *Compiled Statutes*, 1887, p. 315. In Kansas, the trustee, and in Missouri, the town clerk is ex officio assessor: Canfield, *Local Govt. in Kansas*, 14; *Township Organization Law of Missouri*, 9. In Missouri, where town organization has not been adopted, the assessor is an elective county officer: Shannon, *Civil Govt. in Mo.*, 308–9.

and require him "to make a correct statement of his taxable property," which statement should be signed and sworn to. The assessor shall thereupon assess the value of the property and enter the same in his books. If any person required by law to list property shall be sick or absent when the assessor calls, the latter may notify such person to deliver the schedule to him on some convenient day.

In case of failure to obtain a statement of personal property, the assessor shall ascertain the amount and value thereof, and make the assessment; and he may also examine, on oath, "any person whom he may suppose to have knowledge of the amount or value of the personal property" which any one refusing is required to list.

On the first Monday of June annually the assessor and the town board are required to meet to revise the assessments, to hear complaints, and make needful corrections. The assessor is further required, on or before the second Monday of June, to make return to the county clerk, who shall make any necessary corrections in the assessment of real property.

The final equalization of local assessment is made by the county board, which may also hear appeals from the board of the township.

The assessor, before entering upon his office, must give a bond in the sum of five hundred dollars.

In addition to his ordinary duties the assessor is required each year, under authority of the county board, to take the census of inhabitants; record all births and deaths, and register all males liable to militia service, in his district. It is his duty also to inspect trees planted along the section and half-section lines, in accordance with the act offering a bounty therefor, and make annual report of their condition to the county board.[1]

It goes without saying that right methods of taxation constitute one of the most vital questions with which the people

[1] *Compiled Statutes of Nebraska*, 1887, pp. 592 ff., 52-3.

are concerned; and, lying as it does at the very basis of the state or local revenue, no single administrative function can be more important than that of the assessor. But it is equally apparent that no function is less satisfactorily performed. Whether from the carelessness, favoritism, or incompetence of the assessor, or on account of inadequate laws relating to the incidence of taxation, everywhere throughout the West, and indeed throughout the whole country, there is a growing feeling that existing methods of assessment are fast becoming intolerable. And it is a striking fact, that a similar state of affairs exist in Great Britain. No more beneficent service can be rendered to the people by the economist than by leading the way to a reform of present fiscal methods in accordance with scientific principles.[1]

VII.—The Overseer of the Poor.

(*a*).—*Evolution of the Office.*

From a very early day the care of the poor has been an incident of town or parish government, though the office of overseer, by that name and as an institution recognized by the law, was evolved during the sixteenth century.[2]

But several hundred years before the Norman Conquest the foundation of the first English poor law was established under authority of Gregory the Great. In one of his "responses" or letters to Augustine relating to the government

[1] On this subject should be read the very instructive work of Dr. Ely, *Taxation in American States and Cities*, particularly Parts II and III. For England see Phillips' *Local Taxation in England and Wales*, in Probyn's *Local Government and Taxation in the United Kingdom.*

[2] "Neither the office nor the functions of 'overseers of the poor' are known to the Common Law. This is not a parish office in the sense in which the offices of churchwardens, surveyors of highways, and constables are such," and whose functions "have existed in every parish from time immemorial." Toulmin Smith, *The Parish*, 143.

of the newly planted English church, he declared that Augustine, being a monk, could not properly take the one-fourth part of the oblations and offerings of the faithful which, according to custom, constituted the bishop's share.[1] Accordingly a third instead of a fourth of all such revenues was set apart for the relief of the poor;[2] and this practice was subsequently enforced through the ordinances of the king and witan.

It is provided in the laws of Aethelred "that one-third part of the tithe which belongs to the church go to the reparation of the church, and a second part to the servants of God; the third to God's poor, and to needy ones in thraldom."[3]

Thus, in the early and middle ages, the institution of the tithe was intended to fill the place occupied by the modern rates for relief of the poor. But, as is well known, this object was not fully attained on account of the appropriation by the clergy of nearly the entire revenues of the church to strictly ecclesiastical uses.[4]

However, at an early day, it became the established custom that whatever was set apart for the use of the poor should be distributed under supervision of the parish officers; and this practice was enforced by the canons of the Reformation period. All "beneficed men, not being resident upon their benefices,

[1] The letter of Gregory, written in the year 601, is printed in Haddan and Stubbs' *Councils*, III, 18–19; also in Baeda's *Hist. Ecc.*, I, 27: *Mon. Hist. Brit.*, pp. 132–3; and in the Bohn translation of Baeda, pp. 40–41.

By the law of the Roman Church the revenues from such sources were divided into four parts: one for the bishop, one for the clergy, one for the poor, and one for repairs of the fabric. See Selden, *Hist. of Tithes*, 81; Kemble, *Saxons*, II, 479 note, 431.

[2] This rule is laid down in the *Excerptiones* of Archbishop Ecgbert: Thorpe, *Ancient Laws*, II, 98. Cf. Lingard, *Hist. and Antiq. of the Anglo-Saxon Church*, I, 188–9.

[3] *Aethelred*, IX, 6: Thorpe, *Ancient Laws*, I, 342–3; Kemble, *Saxons*, II, 502–3. See Kemble's entire chapter on "*The Poor*" during the Saxon period: *Ib.*, 497–517; Nicholls, *Hist. of Eng. Poor Law*, I, 13 ff.; Lingard, *Hist. and Antiq. of the A. S. Church*, I, 178–98; Selden, *Hist. of Tithes*, Caps. 7–8.

[4] Toulmin Smith, *The Parish*, 27–29.

which may dispend yearly twenty pounds or above" were required to distribute in alms one-fortieth part of the revenues of their benefices, "in the presence of the churchwardens or some other honest men of the parish."[1] The alms-chest was also in "charge of the churchwardens, or any other two honest men, to be appointed by the parish from year to year;" and the contents of the chest were to be distributed at convenient times "in the presence of the whole parish or six of them."[2] Accordingly "the ancient parish records often contain mention of 'distributors,' chosen by the parish."[3]

But already some years before the date of the canons just cited, a still more interesting office connected with the poor law administration had been created by parliamentary enactment.[4] This was the "collector" of voluntary alms elected by the inhabitants of the parish in the same way as the distributor. In these two local officers, and more particularly the collector,[5] we find the direct prototype of the overseers of the poor who soon after make their appearance.

By an act of the thirty-ninth year of Elizabeth, 1597, embodied and elaborated in the great poor law of the forty-third year of that reign, the churchwardens and four "substantial householders" of each parish, "who shall be nominated yearly in Easter Week, under the hand and seal of two or more justices of the peace . . . dwelling in or near the same parish, shall be called *overseers of the poor*."[6] But the office was

[1] Contained in the "Injunctions" of 1547 and 1559: Sparrow's *Canons*, 5, 6, 71, 247, cited by Toulmin Smith, *The Parish*, 95.

[2] Toulmin Smith, *The Parish*, 143; Sparrow's *Canons*, 9.

[3] See Toulmin Smith, *The Parish*, 143, and his extracts from the records of the parish of Steeple Ashton, *Ib.*, 491 ff., particularly p. 510.

[4] By 27 Hen. VIII, cap. 25, 1535–6; 5 and 6 Ed. VI, cap. 2, 1551–2; 2 and 3 Philip and Mary, cap. 5, 1555; and 18 Elizabeth, cap. 3, 1575–6: Nicholls, *Hist. of English Poor Law*, I, 122, 136, 144, 155, 170.

[5] Pointed out by Nicholls, *Hist. of Eng. Poor Law*, I, 136.

[6] Toulmin Smith, *The Parish*, 145–6; Nicholls, *Hist. of Eng. Poor Law*, I, 193 f.

probably elective, as was that of the earlier collectors and distributors, the function of the justices being merely to confirm the previous choice of the parishioners.[1]

Thus, a few years before American colonization began, was inaugurated the essential features of the parish system of pauper administration which remained substantially unchanged, though the subject of many statutes, until the institution of the poor law unions in 1834.[2]

(*b*).—*Rise of the Overseer in the American Colonies.*

During the early years of New England history the poor of each town were cared for by incidental contributions of food or money as cases demanding relief arose. And in some instances, just as in the days of Augustine or Aethelred, it was the ecclesiastical and not the civil township which first assumed the duty. Thus in Cambridge, for a considerable period, the oblations of the faithful, collected usually in the congregation on the Sabbath day, were the only substitute for a poor rate; and not until 1663 is there any evidence in the records of this burden having been undertaken by the town;[3] while as late as 1679, the society continued to make large contributions for this purpose.[4]

In Massachusetts, when the care of the poor became a town charge, the functions of overseer usually devolved upon the

[1] Such is the view of Toulmin Smith, *The Parish*, 146. The act of 43 Elizabeth is analyzed by Gneist, II, 638–9.

[2] The subject cannot here be treated in detail. On English poor laws in general, see Gneist, II, 638–723; Chalmers, *Local Govt.*, 51–60. Standard works are Eden's *State of the Poor*, Nicholls' *History of the English Poor Law*, Pashley's *Pauperism and Poor Laws*, and Burn's *History of the Poor Laws*; much information is also contained in Probyn's *Local Government and Taxation in the United Kingdom*.

[3] Paige, *History of Cambridge*, 218–19.

[4] Paige, *History of Cambridge*, 254, 273–4.

selectmen;[1] but separate officers might be chosen whenever the electors saw fit.[2]

In the Plymouth jurisdiction, however, as early as 1658, each town was required by order of the general court to choose "two or three men" to provide for the children of indigent parents.[3] A similar clause is contained in the Rhode Island code of 1647, every town being ordered to "provide carefully for the reliefe of the poore, to maintayne the impotent, . . . to employ the able," and to "appoint an overseer for the same purpose."[4]

The law of settlement in Massachusetts is of considerable interest as affording early precedents for the existing procedure in the western states. In 1659 a comprehensive order was passed by the general court, providing—"for the avoyding of all future inconvenjencjes referring to the setling of poore people that may neede releife from the place where they dwell"—that, if, any person with or without a family "shall be resident in any toune or peculjar of this jurisdiccon for more than three moneths wthout notice given to such person or persons by the connstable, or one of the selectmen of the sajd place, . . . that the town is not willing that they should remajne as an inhabitant amongst them, and in case, after such notice given, such person or persons shall notwthstanding remajne in the sajd place, if the selectmen . . . shall not, by way of complaint, petition the next county court of that sheire

[1] So, for example, in Worcester: *Town Records*, 1753–1783, p. 169; in Salem: *Town Records*, 215; in Cambridge: Paige, *History of Cambridge*, 218–19; in Braintree: *Records*, 573, etc.

[2] So, in Boston, overseers were first elected in 1690/1: *Town Records*, 1660–1701, p. 206. The right of the electors to decide whether the selectmen or special overseers shall have charge of the poor law administration is implied in the statutes: *Acts and Resolves*, I, 67.

[3] *Plym. Col. Rec.*, XI, 111, 120, 194. But the name "overseer" is not used.

[4] *Rhode Island Col. Rec.*, I, 184–5, citing the 43 Elizabeth. In Connecticut it was required that every town should provide for its own poor: *Col. Rec.*, III, 300. And an ordinance of Andros directed that overseers be appointed: *Col. Rec.*, III, 428.

for releife . . . , every such person . . . shall be provided for . . . , in case of necessity, by the inhabitants of the sajd place where he or she is so found." And the county court was authorized "to heare and determine all complaints of this nature, and setle all poore persons" in any town of the colony, to be provided for by the constable or selectmen as a town charge. From the decisions of the county court appeal lay to the court of assistants.[1] The essential features of this law were maintained throughout the colonial era.[2]

In the Middle Colonies the administration of the poor law conformed closely to the English model. Thus in New York the churchwardens of each parish or as many overseers as each township, precinct, or manor saw fit to elect, were entrusted with the care of the poor. Questions of settlement were decided by any two justices of the peace, with appeal to the quarter sessions.[3]

In Pennsylvania, during the early period, paupers were cared for by the next justice of the peace.[4] Later it was enacted that two overseers should be elected in each township or borough; and their accounts were audited by a board specially chosen for the purpose.[5]

The functions of overseer in Virginia devolved upon the churchwardens of every parish, under the direction of the vestry which was responsible for the necessary funds.[6] By

[1] *Mass. Col. Rec.*, IV, I, 365. Cf. the previous orders of 1639 and 1655 in *Mass. Col. Rec.*, I, 264; IV, I, 230.

[2] *Acts and Resolves*, I, 67, 378–81, etc. See G. S. Hale's interesting chapter on the *Charities of Boston* in *Memorial Hist. Boston*, IV, 641 ff.

[3] Van Schaack, *Laws of New York*, 1691–1773, I, 43, 343; II, 750–56. "Poor-master" instead of "overseer" also appears; Ib., II, 576. Acts providing for overseer in particular counties or districts were passed: Ib., II, 799, 570, 438, etc.

[4] *Charter and Laws*, 1682–1700, pp. 115, 142.

[5] See the act of 1771, *Acts of the Assembly*, I, 404–14; Gordon, *Hist. of Pa.*, 552; Gould, *Local Govt. in Pa.*, 30; and below, Chap. VIII, III, (*e*).

[6] Act of 1727: Hening, *Statutes*, IV, 210–11.

an act of 1646, the county court was authorized to bind out poor children "to tradesmen or husbandmen to be brought up in some good and lawful calling;" and because "God Almighty, among many His other blessings, hath vouchsafed increase of children to the colony," which if properly "instructed in good and lawfull trades may much improve the honor and reputation of the country;" and since "through fond indulgence or perverse obstinacy" parents are averse to parting with their children: therefore the commissioners of the county court are permitted in their discretion, to make choice of two children in each county who shall be sent to James City to be employed in the public flax houses, and supported at public expense.[1] In 1668 it was enacted that a work-house in each county should be provided by the commissioners, "with the assistance of the respective vestries," where poor children should be instructed in spinning, weaving, and other useful occupations.[2]

A definite law of settlement was enacted in 1727. One year's residence was required to constitute any person an inhabitant of the parish. On complaint of the churchwardens, every justice of the peace was empowered to remove persons to the parishes where they should respectively belong; and the churchwardens of such parishes were required to receive them under penalty of twenty pounds for refusal.[3]

In South Carolina, likewise, the care of the poor devolved upon the parish, each vestry being authorized to choose two or more "sober, discreet, and substantial persons to be overseers."[4]

[1] Hening, *Statutes*, I, 336–7.

[2] Hening, *Statutes*, II, 267. But in 1755 provision was made for parish work-houses for ordinary beggars and paupers: *Ib.*, VI, 476.

[3] Hening, *Statutes*, IV, 210–11. For subsequent acts, see *Ib.*, VI, 31–2, 475–8. On Virginia poor laws, see Ingle, *Local Govt. in Va.*, 64–5.

[4] South Carolina *Statutes at Large*, II, 594 (1712).

(c).—*The Western Overseer.*

Thanks to the many natural advantages of a new country, the care of the poor in the United States is not as yet felt to be the crushing burden which renders pauper administration in England the one subject of ceaseless anxiety. Nevertheless in some of the more densely populated states the annual expenditure for this purpose is already enormous; and even in those more sparsely settled, the subject is fast becoming one of the gravest concerns of local government.[1]

As a general rule, throughout the West, the administration of the poor law belongs partly to the township and partly to the county, with a tendency to vest it entirely in the latter whenever the county board shall see fit to establish a poor house; but the statutes show great diversity of detail.

Thus, in Nebraska, the justices of the peace in each precinct or the town supervisors, as the case may be, have "entire and exclusive superintendence of the poor" in their respective districts, except that a physician may be employed for the entire county. But the cost of poor relief is a county charge, and the township overseers are required to report to the county board. Furthermore, whenever the county board shall enter upon their records that they have established a poor house, and that such poor house is ready for the reception of the poor of the county, then the authority conferred upon the precinct or township overseers shall cease.[2]

[1] Thus in Michigan the whole amount expended for the poor in 1885 was $808,916.94 against $630,239.54 in 1876: *Rep. St. Bd. Cor. and Char.*, 1885–6, p. 152. In Wisconsin the cost of maintaining the county and city poorhouses alone in 1886, was $112,047.70; while more than twice that amount was spent for outdoor relief: *Rep. St. Bd. Char. and Reform*, 1885–6, pp. 228–31. In Minnesota the entire cost of poor relief for 1885, excluding purchase of farms and permanent improvements, was $267,620.94: *Rep. St. Bd. Cor. and Char.*, 1886, pp. 174–6. In New York the total expenditures for outdoor relief and in connection with poorhouses, in 1887, was $1,176,903.86: *Rep. St. Bd. Char.*, 1887, p. 83.

[2] *Compiled Statutes of Neb.*, 1887, pp. 319, 546–7.

In New York, Michigan, and Wisconsin a county option law exists.

In the latter state each township is required to relieve and support all poor and indigent persons who have gained a legal settlement therein; but paupers not so settled are cared for by the county authorities. The county board may, however, at any annual or special meeting abolish the distinction between town and county poor, and appoint three county superintendents who shall have entire charge of pauper administration. In like manner, at any time, the board may return to the township plan.[1]

The dual system has also been adopted by Illinois. The people of each county may, at any time, determine by majority vote whether the care of the poor shall be a county or a township charge. But in the latter event all paupers may be provided for in the county poor house at the expense of the respective townships whence they were sent; and in any case, whether the township or county plan exists, the local overseers[2] are each required to file, annually, a detailed report of their transactions with the county clerk, for the inspection of the county board.[3]

In Ohio it is the duty of the trustees to provide for paupers at the expense of the township; unless, after due inquiry, such persons are found worthy of "public" relief, when they became a county charge.[4]

The powers of the township in this regard are reduced to a minimum of importance in Indiana, Iowa, and Kansas. The trustees, as *ex officio* overseers, may provide temporary relief;

[1] *Revised Statutes of Wis.*, 1878, pp. 457, 460; *Revised Statutes of New York*, III, 1854–1869; Howell's *Annotated Statutes of Mich.*, 1882, I, 496–501; Green, *Townships and Township Officers*, 125–30.

[2] In counties where township organization has not been adopted the poor of each precinct are placed under the supervision of overseers nominated by and responsible to the county board.

[3] Cothran's *Revised Statutes of Ill.*, 1885, pp. 1053–1062.

[4] Williams, *Revised Statutes*, 1886, I, 203, 303–5.

but all real authority is possessed by the county, at whose expense paupers are supported whether or not a poor house has been established.[1]

The duties of overseer of the poor are of great and increasing importance, and scarcely any office requires the exercise of greater discretion for its proper administration. The principal functions of the overseer will be incidentally revealed in the following brief summary of the Wisconsin statute.

In counties where the township plan has been adopted, the board of supervisors are *ex officio* overseers;[2] and each township is required to support all indigent persons, entitled to public relief, who are "lawfully settled therein."

The definition of what constitutes a legal settlement has always been the vital clause of the English poor law. In Wisconsin lawful settlement may be variously acquired:

"A married woman shall always follow and have the settlement of her husband, if he have any within the state, otherwise her own at the time of marriage, and if she then had any settlement it shall not be lost or suspended by the marriage; and in case the wife shall be removed to the place of her settlement, and if the husband shall want relief," he shall also receive it there. Legitimate children have the settlement of their father;

[1] *Revised Statutes of Indiana*, 1881, pp. 1302–11; McLain's *Annotated Statutes of Iowa*, I, 380–85; *Compiled Laws of Kansas*, 1885, pp. 597–603.

[2] In Ohio, Indiana, Kansas, and Iowa the township trustees are ex officio overseers; in Michigan, Illinois, and Nebraska these duties are performed by the supervisor; but in Nebraska, for counties not under township organization, this function is discharged by the justices in each precinct; and the same is true for Illinois, except that any other person may be appointed by the county board. Only in two states of the group under consideration—New York and Pennsylvania—are separate overseers elected in each township. Previous to 1875, however, Michigan had in every township two elective "directors" of the poor: Green, *Townships and Township Officers*, 125. In Minnesota and Dakota, there does not seem to be any township officer for supervision of the poor: *Statutes of Minn.*, 1878, pp. 279 ff.; *Compiled Laws of Dakota*, 1887, pp. 476–9. But each township in Minnesota is authorized to levy a tax for poor relief: *Statutes*, 170.

or, if he have none, then of the mother. Illegitimate children always follow the settlement of the mother; but a child does not gain a settlement by birth in a place, unless the parent or parents are legally settled there at the time. Every person of full age who resides in a town one whole year, thereby gains a settlement; but no one can gain a settlement by residence, however extended, while he is being supported as a pauper. A minor whose parent, or a woman whose husband, has not a settlement in the state, may acquire such by one year's residence in a town; and a minor by being bound as an apprentice, thereby immediately gains a settlement where his master dwells.

Another fundamental principle of all English poor laws, ancient or modern, is the requirement that the poor shall be relieved by their near kindred, according to their ability, before the town can be called upon for their support. In Wisconsin this obligation falls first upon the father, if of sufficient means; otherwise, upon the mother or children in the order named. It is the duty of the overseer to report all cases of neglect on the part of relatives to the county judge, who shall order them to furnish such relief as the township overseers shall deem sufficient. In case of refusal, assistance is furnished by the overseer, and the cost thereof may be collected from the delinquent by suit in the name of the town.

When a minor becomes, or is likely to become, a township charge, it is the duty of the overseer to bind him by indenture as apprentice to some respectable householder of the county. The overseers are also required to assist or support any stranger who may be taken sick or become lame or otherwise disabled, in the town; but the cost of such relief is made a county charge, and may be recovered from the township in which the person relieved has a legal settlement.

Any one removing or causing to be removed any person from a place without the state into any town therein, with the intention of making such town chargeable for his support, is liable to a fine of fifty dollars, and in default of payment or

sufficient surety, may be committed to the county jail for a time not exceeding three months.[1]

VIII.—The Overseer of Highways.

(*a*).—*Evolution of the Office.*

The genesis of the English highway rate must be sought in the *brycgbot*,[2] or obligation for the repair of bridges and roads, incumbent upon every land owner during the Saxon period. This obligation, like other branches of the *trinoda necessitas*, was discharged in personal services; indeed, *bryc-geweorc*, or bridge work, is employed as the exact equivalent of *brycgbot* in the ancient laws.[3] And it is highly probable, judging from later practice, that such services were rendered under the supervision of the local reeves and tithingmen: the fruitful progenitors of a numerous group of parish and manorial functionaries, among whom is the highway overseer. The spectacle so familiar in our own times, of the road officer with his company of neighbors engaged in repairing the public ways, was also familiar to the ceorls of Britain twelve hundred years ago.[4] Mention of the *trinoda necessitas* occurs in English documents early in the eighth century, and there can be little doubt that this triple service was rendered by our German

[1] *Revised Statutes of Wisconsin*, 1878, pp. 456 ff.; *Supplement*, 327–9.

[2] *Brycgbot* is mentioned in Aethelred, V, 26, VI, 32, § 3; Canute, II, 10, 65: Schmid, *Gesetze*, 224, 232, 276, 304.

[3] *Bryc-geweorc* is used in the *Rectitudines Singularum Personarum*, cap. 1: Schmid, *Gesetze*, 370. On the Anglo-Saxon manor, the *geneat* was bound to make new ways: *nîge faran tó tûne feccan: Rect. Sing. Pers.*, cap. 2: Schmid, *Gesetze*, 372.

[4] Blackstone, however, assures us that it was not formerly "incumbent on any particular officer to call the parish together and set them upon this work:" *Commentaries*, I, 358. But Blackstone, as usual, is not a safe guide in historic questions. See Toulmin Smith, *The Parish*, 105, note, who regards the constable—the representative of the tithingman—as the original overseer.

ancestors on the continent long before its Latin name was invented.[1]

From time immemorial the maintenance of highways has been an obligation of the parish. "Indeed," says Toulmin Smith, "the making of by-laws for a highway rate is of so much more ancient and common practice than that of a rate for keeping up the fabric of the church . . . , that the cases as to church rates are found to be sustained, both in argument and judgment, in the old reports, by comparing a rate for repairing the church to a rate for repairing bridges and highways. Practically speaking, it was the constable's duty to see that the conditions of their tenure were fulfilled by the holders of land; and it was always a bounden duty of the courts leet[2] regularly and periodically to inquire 'if there be any ways, waters, ditches, or paths obstructed, narrowed,

[1] The *trinoda necessitas* or *threo neode* comprised the *brycgbot*, the *fyrd*, or military service, and the *burhbot*, or repair of fortifications. The latter included the repair of borough walls, and, of course, fell heavily upon the owners of lands residing in towns. "The *trinoda necessitas* first appears in genuine Anglo-Saxon charters about the beginning of the eighth century. It occurs, however, earlier in disputed ones, *e. g.* A. D. 616, *Cod. Dipl.* dccccIxxxiii. It is mentioned in the act of the council of Clovesho of A. D. 742, *Councils*, etc. III, 341; and in a charter of Ethelbald, issued at Godmundesleah in A. D. 749, *Ibid*, p. 386. It occurs two or three times in charters of Offa, more frequently in those of Kenulf, and becomes very general after the time of Egbert. The corresponding obligations in the Frank empire are attendance on the host, repairing of roads, fortifications, and bridges, and watch:" Stubbs, *Constitutional History*, I, 76, note 4. Compare *Ib.*, pp. 95, 105, 184, 190, 194; Waitz, *Deutsche Verfassungsgeschichte*, IV, 30–31; Smith, *The Parish*, 104, 469.

In later Anglo-Saxon laws and documents the burden of the *trinoda necessitas* appears as an incident of land tenure; but among the Teutonic peoples generally these services were undoubtedly required of all free men. See Lodge, *Anglo-Saxon Land Law*, 60–61; Roth, *Beneficialwesen*, 42; *Feudalität und Unterthanverband*, 322 ff.; Sohm, *Reichs- und Gerichtsverf.*, I, 333 ff.

The Roman origin of the *trinoda necessitas* is maintained by Coote, *The Romans of Britain*, 259 ff.; Pearson, *Early and Middle Ages*, I, 266.

[2] See the list of items concerning highways to be enquired of at the leet, in Scroggs, *Courts-Leet and Courts-Baron*, 19.

stopped, or turned out of the right course to a wrong course, unto the damage of the king's people.' The like inquiries were always made at the sheriff's tourns. If any mischiefs were found, penalties were imposed."[1]

The function of the constable as highway overseer appears plainly in the statute of Winchester, enacted in 1285. It is "commanded that highways leading from one market town to another shall be enlarged, whereas bushes, woods, or dykes be, so that there be neither dyke, tree, nor bush whereby a man may lurk to do hurt within two hundred foot of the one side and two hundred foot on the other side of the way; so that this statute shall not extend unto oaks, nor unto great trees, so as it shall be clear underneath. And if by default of the lord that will not abate the dyke, underwood, or bushes, in the manner aforesaid, any robberies be done therein, the lord shall be answerable for the felony; and if murder be done the lord shall make a fine at the king's pleasure. And if the lord be not able to fell the underwoods, the country shall aid him therein. . . And in every hundred and franchise two constables shall be chosen," who "shall present before justices assigned such defaults as they do see in the country about armor, and of the suits, and of watches, and of highways."[2]

In the "Articles" of the thirty-fourth year of Edward I, relating to the enforcement of the Statute of Winchester, constables are directed to "enquire if the highways from one market town to another be enlarged, as well in our lord the king's own woods as elsewhere," and if not "to enquire what

[1] Toulmin Smith, *The Parish*, 105. But on the tourn see especially Dalton, *Officium Vicecomitum*, 392–4.

[2] Stubbs, *Select Charters*, 474. An early provision contained in the so-called Laws of Henry I directed that "a highway shall be broad enough for two wains to pass each other, with room for the drivers to ply their whips freely, and for sixteen soldiers to ride in harness side by side:" *Leges H. I.*, lxxx, 3: Schmid, *Gesetze*, 477, as rendered by Toulmin Smith, *The Parish*, 105.

ways and where they be, and who ought to have enlarged them."[1]

Of course, in early days, comparatively little labor was bestowed upon the highways. A broad strip was left on either side, in order that the track might be shifted as any portion of the road became impassable; and it is a curious illustration of the tenacity of communal rights, that, subsequently, whenever a person enclosed any portion of such strips, he became instantly liable for the maintenance of the adjacent way.[2]

No material change in the management of highways was made until the age of the Tudors, when a special office was differentiated. In 1555 it was enacted that two "surveyors and orderers" should be appointed by the constables and churchwardens of every parish.[3] The name "orderer" is significant; for the functionary who bore it was a mere director of the actual work on the roads. It is also worthy of note that the ancient right of the constable seems to be acknowledged in allowing him to join in the nomination.

Under Elizabeth the powers of the surveyor were enlarged; and in the reign of Charles II, the office became elective in each town or parish, the overseers being empowered, "with the advice of two or more substantial householders," to lay an assessment on the parish for highway purposes.[4]

In the time of Blackstone the surveyors were nominated by two justices of the peace;[5] but in 1836 the right of election was restored.[6]

Finally by the acts of 1862 and 1864 the ancient office of surveyor was practically abolished, and a new system of highway administration, with salaried officials, created. The old

[1] Toulmin Smith, *The Parish*, 105–6.

[2] Toulmin Smith, *The Parish*, 467–8, 333.

[3] By 2 and 3 Philip and Mary: Gneist, II, 786; Smith, *The Parish*, 106.

[4] Toulmin Smith, *The Parish*, 108.

[5] *Commentaries*, I, 358.

[6] Gneist, II, 788 ff.

surveyor not only served without remuneration, but he was prohibited, under severe penalty, from having any interest, direct or indirect, in contracts for materials, and no surveyor could "use or let to hire his own team, or sell his own materials" for any purpose connected with the fulfilment of his official duties.[1] But the act of 1836 provided for paid surveyors; and by the acts of 1862 and 1864, it was required that the county should be divided by the general sessions into districts called "highway parishes," not identical with the old parishes, in each of which two or more waywardens should be chosen. The waywardens together with the justices of the parish were constituted a "district board." To the old parish and the old surveyor was only left the assessment of the highway rate.[2]

The title warden was not a new one. In the records of a single parish, that of Steeple Ashton, during the latter half of the sixteenth century, the road officer is styled wayman, waywarden, supervisor, and overseer of highways.[3]

It is interesting to note that the principle of maintaining the highways by personal services was not materially weakened by legal enactment until 1773, when a road tax was authorized; while in 1836 money payment instead of labor was made the rule in all cases. However, in practice, it had long been the custom to allow anyone to compound for his "statute duty," as the personal services were styled, on the so-called "composition days."[4]

[1] Toulmin Smith, *The Parish*, 111–12.

[2] On these statutes, see Gneist (1871), 837. But the highway rate is often assessed as a part of the poor rate.

[3] See extracts from these records in Toulmin Smith, *The Parish*, 509. Here we have, in a single township, most of the names employed in the American colonies—an excellent example of the spontaneous and natural growth of local nomenclature.

[4] Smith, *The Parish*, 566, note; Gneist, II, 788, 789. Rates for new ways or special purposes had, however, always been levied: Smith, *The Parish*, 566.

(*b*).—*Highway Surveyors in the American Colonies.*

In New England the physical features of the country were such as to render the construction and maintenance of highways an expensive and otherwise burdensome duty. Everywhere we find the towns each caring for their own roads and bridges; and for this purpose, enacting by-laws, levying rates, and choosing surveyors.[1]

But in the case of bridges over large streams, or of great thoroughfares, and whenever it might seem expedient, the burden was shared by the county or the colony.[2] Sometimes the care of contiguous highways was made a condition in the grant of lands to individuals.[3]

The general court exercised supreme jurisdiction over highway administration; and its legislation in this regard presents some interesting features. In Rhode Island, as early as 1647, each town was ordered to "choose and order y^e^ authoritie of two Surveyors for the Highways, and appoint time to mend them;" and every person exporting cattle was required to notify the surveyor and return to him the "marks" of such cattle, under penalty of forfeiture for neglect.[4]

In the year 1643 the Connecticut towns were each required to elect two surveyors;[5] and the code of 1650 contains a typical enactment for the regulation of the surveyor's functions. It is recited that since "the mainteineing of high wayes in a

[1] Two overseers in each town is perhaps the general rule; but often the number is much greater. See *Boston Town Records*, 1660–1701, pp. 183, 225, etc. In Salem both "surveyor" and "overseer" are used: *Town Records*, 67, 90, 130, etc. *Worcester Town Records*, 1753–1783, pp. 80, 87, etc. In Dorchester the road officer was styled "supervisor:" *Town Records*, 298.

[2] *Mass. Col. Rec.*, II, 262–3; IV, Part I, 306–7; *Plym. Col. Rec.*, I, 114; II, 127. But these references show a tendency to leave the whole matter of constructing and repairing bridges and ways to the towns.

[3] See an example in *Salem Town Records*, 12.

[4] *Rhode Island Col. Rec.*, I, 150.

[5] *Conn. Col. Rec.*, I, 91.

fitt posture for passage according to the severall occassions that occurre, is not onely necessary for the comfort and safety of man and beast, but tends to the proffitt and advantage of any people;" therefore "it is thought fitt . . . , that each Towne within the Jurissdiction shall euery yeare chuse one or two of theire inhabitants as Surveyors, to take care of, and ouersee the mending and repairing of High wayes . . . , whoe haue hereby power allowed them to call out the severall cartes or persons fitt for labour in each Towne, two dayes at least in each yeare, and so many [more] as in his or theire judgements shall bee found necessary . . . , to bee directed in theire worke by the said surveyor or surveyors, and it is left to his or theire libberties either to require the labour of the severall persons in any familye, or of a teame and one person, where such are . . . , giving at least three dayes notice . . . before hand." Each day's neglect of service for man or team works a forfeiture respectively of two shillings sixpence or six shillings, to be collected by distress on a true presentment by the surveyor before a magistrate, and expended in the "hire of others to worke in the said wayes."[1]

In Massachusettes we catch a glimpse of the constable in the performance of an ancient duty. By order of the general court, 1658, it was provided that on complaint of any person or town liable for the maintenance of highways, setting forth the inability to procure workmen, the constable should be empowered by any magistrate's warrant to impress the requisite number of laborers, who shall be paid by the parties "to whom such bridges or passages doe belong."[2]

The selectmen were authorized to lay out private ways in

[1] *Conn. Col. Rec.*, I, 527–8. Cf. the Mass. highway act of 1693, in *Acts and Resolves*, I, 136 ff.; and the Plymouth acts of 1644 and 1649: *Col. Rec.*, XI, 112.

[2] *Mass. Col. Rec.*, IV, I, 322; see also the *Plymouth Col. Rec.*, XI, 11. Later the Massachusetts surveyors were granted power to impress: *Acts and Resolves*, I, 136.

their respective towns;[1] but public roads were ultimately placed under the control of the county court of sessions.[2]

An interesting use of the jury appears in connection with the highway administration. Thus, in 1640, the general court of Plymouth provided, that when it should "fall out that a way be wanting" the governor should "panell a Jewry and upon Oath charge them to lay out such way as in conscience they finde most beneficiall for the Comon weale and as little prejudice as may be to the p'ticular."[3] Likewise, in the later period, the jury was employed by the county court in the laying out of new ways.[4]

In New York the freeholders of each town were allowed in 1691 to choose annually three surveyors to lay out, regulate, and amend highways. But before becoming valid it was required that their orders should be registered in the town book and approved by the court of sessions.[5] However—as was the custom in that colony—special statutes were enacted for particular places. Thus in Dutchess and several other counties, a double authority for the highway administration was created. For the entire township three commissioners were annually chosen by the freeholders to lay out and regulate public ways. Below these officers and subject to their control, were the overseers elected one for each of the road districts into which the township was divided.[6] And this plan, it should be noted, constitutes the direct prototype of the dual organism now existing in New York and several of the more populous western states.

[1] *Mass. Col. Rec.*, II, 4. This was also the later practice: *Acts and Resolves*, I, 137, 721.

[2] *Acts and Resolves*, I, 136.

[3] *Plym. Col. Rec.*, XI, 11. Compare *Ib.*, 112, 122.

[4] *Acts and Resolves*, I, 136–7. The jury, as we shall see, is still quite generally employed in this country in the laying out of roads.

[5] Van Schaack, *Laws of New York*, 1691-1773, I, 3.

[6] Van Schaack, *Laws of New York*, II, 660, 487, 774, 804, 530, etc.; I, 262. In Charlotte county, *county*, instead of township commissioners, seem to have been appointed: *Ib.*, II, 702.

During nearly the entire colonial period, in Pennsylvania, the care of highways belonged to the county court by which three "overseers" were appointed for the purpose.[1] But in 1772 each township was allowed to choose two "supervisors," who, besides their ordinary duties, were authorized, with the approval of the justices, to levy a limited tax for opening and repairing highways.[2]

In Virginia, likewise, the county court had control of the highway administration. Surveyors were appointed for the various walks or precincts into which the county was divided. But in that colony the watercourses were the principal thoroughfares, and consequently the management of highways was a matter of less importance than in New England. The surveyor, like the orderer of 1555, was little more than a foreman, under direction of the justices.[3]

(*c*).—*The Western Overseer.*

Throughout the great majority of western states overseers are either elected or appointed for subdivisions of the township known as "road districts;"[4] elsewhere their duties devolve upon the township board.[5] The functions of the

[1] *Charters and Laws*, 1682–1700, pp. 136, 233.

[2] *Acts of the Assembly of the Province*, I, 444–49.

[3] Ingle, *Local Institutions of Va.*, 92–3. See Chap. IX, III, (*b*).

In Maryland also the road overseers were appointed by the county court: Bacon, *Laws of Md.*, Act of 1704, Ch. XXI, 3, 4. In South Carolina commissioners for parishes or subdivisions of parishes were nominated by the general assembly: *Statutes at Large*, IX, 49, 144–5, etc., etc. The commissioners were empowered in 1721 to appoint overseers: *Ib.*, p. 55.

[4] In New York and Illinois district overseers are appointed by the township commissioners of highways; in Indiana "road masters" are nominated by the town "superintendent of roads;" and in Ohio the town trustee appoints as many supervisors of roads as he thinks proper.

Dakota, Minnesota, Wisconsin, Kansas, Nebraska, and Missouri have elective district overseers. "Highway supervisors" are elected for districts in Iowa.

[5] In Pennsylvania the office of overseer devolves upon the township supervisors: Brightly's Purdon's *Digest*, II, 1503–5, 1498 ff.

office remain essentially the same as they have been for centuries, and may be very briefly described.

In Nebraska, for example, it is the duty of each county board to divide the county, except that portion occupied by cities and incorporated villages, into as many road districts as may be necessary, but no district may comprise portions of two different townships or precincts.

The revenue for the support of highways is derived from two sources: the "labor tax" of three dollars each on all males between the ages of twenty-one and fifty, which may be paid in labor; and the "road tax" of not to exceed five mills on the dollar for the county, or two mills for the township. In addition to this is the county bridge fund of not to exceed four mills, and the township bridge fund of not more than two mills on the dollar of assessed valuation.[1]

In counties not under township organization one-half of all moneys paid into the county treasury in discharge of the road tax constitutes a county fund at the disposal of the county commissioners; the other half, together with all moneys derived from the labor tax, is reserved as a road district fund and is placed at the disposal of the overseer of the district in which it was levied.[2]

Where town organization has been adopted, the township, as just stated, may vote not more than two mills on the dollar for roads and two mills for bridges, and these levies, together with all moneys collected in discharge of township labor tax, constitute the "township road fund," one-half of which is held by the treasurer subject to the order of the town board; while the remaining half may be expended by the overseers of the respective districts in which the tax was levied.[3]

In the administration of the road law, the overseer has much discretionary power. At any time between the first of

[1] *Compiled Statutes of Nebraska*, 1887, 598, 321.
[2] *Compiled Statutes of Nebraska*, 1887, 636.
[3] *Compiled Statutes of Nebraska*, 1887, pp. 321, 638.

April and the first of October, he may, personally or in writing left at their places of abode, summon all residents of his district liable to labor and road tax, to appear at a time and place designated by him, for the purpose of working upon the roads; and they may render all of the labor tax and three-fourths of the road tax in labor. To facilitate this the county clerk is required annually to furnish each overseer with a list of the property of each person in his district subject to taxation for road purposes.

The overseer may cause all nuisances or obstructions to be removed from the highways, and, if necessary, recover the cost of removal before a justice of the peace. In case of sudden damage to roads or bridges, he may, on a single day's notice, call out as many of the residents of his district as he shall deem necessary to repair the damage; and every person notified must obey the call under penalty of five dollars for neglect. It is also his duty to provide against the spread of prairie fires in his district, by causing the grass to be burned between furrows ploughed on either side of the principal thoroughfares. He may likewise, on the establishment of new roads, remove enclosures from private fields when the owners, after proper notice, neglect to do so.

Before entering upon the duties of his office the overseer must give bond in the sum of five hundred dollars;[1] and, when required, he must render to the township or the county board, as the case may be, an account of all the receipts and expenditures of his office.[2]

The foregoing summary fairly illustrates the character of the township highway law throughout the west, when its administration is vested wholly in district overseers accountable only to the town or county board.[3]

[1] *Compiled Statutes of Neb.*, 1887, p. 94.

[2] *Compiled Statutes of Neb.*, 1887, pp. 635–39.

[3] Compare *Revised Statutes of Wis.*, 1878, pp. 275, 393 ff.; *Statutes of Minn.*, 1878, pp. 255 ff.; Williams' *Revised Statutes of Ohio*, I, 977 ff.; Brightly's

But in several states, where the maintenance of highways has become a matter of very great importance, the ancient office of surveyor is differentiated into two forms: a superior office for the entire township called "commissioner of highways;" and an inferior office for the respective road districts bearing the name of overseer.

Thus, in Michigan, a commissioner of highways is annually chosen in each township for the general supervision of all roads and bridges therein.[1] To him the elective district overseers are subordinate. The direction of the entire procedure in the laying out of new ways—a matter often requiring the exercise of the utmost discretion in order to avoid expensive litigation —is entrusted to the commissioner. And when a private road is demanded, a jury of the vicinage is summoned to determine whether the way be necessary and to assess the damage in case it be granted. Furthermore the commissioner is authorized by law to divide the township into road districts, to fill vacancies in the office of overseer, and to assess the taxes for highway purposes.[2]

This is the New York system, and it exists also in Indiana[3] and Illinois. In these states the commissioners have even greater powers than in Michigan. Not only are all the more important functions of highway administration performed by them, but the overseers are their nominees. In Illinois three commissioners are elected in each township for a term of three years, one retiring annually; and they are constituted a board with the right to choose their own president and appoint a

Purdon's *Digest* (Pa.), II, 1495 ff.; McLain's *Annotated Statutes of Iowa*, I, 246–54; *Compiled Laws of Dakota*, 1887, p. 289.

[1] Green, *Townships and Township Officers*, 28, 41.

[2] The Michigan road law is very elaborate and exceedingly interesting. It is discussed in a thorough manner by Green, *Townships and Township Officers*, 160–211. See Howell's *Annotated Statutes*, 1882, I, pp. 384 ff.

[3] In Indiana the officer corresponding to the commissioner is the "superintendent of roads" chosen biennially, who appoints the "road masters:" *Revised Statutes*, 1881, pp. 1091, 1093–1096.

superintendent or such overseers for the execution of their commands as they may find necessary.[1]

The dual system of highway administration prevails in a somewhat less developed form in Kansas and Wisconsin. In the former state, the town trustee, clerk, and treasurer are styled the "board of commissioners of highways," with powers similar to, but less extended than, those of the Illinois commissioners.[2] In Wisconsin the town supervisors are required to perform the duties of highway commissioners—a name which they formerly bore.[3]

IX.—Perambulators and Fence Viewers.

(*a*).—*The Mark Procession.*

In the days of the ancient mark system, especially after the custom of periodical allotments to individuals arose, the question of fences and boundaries became an important one for the community. Not only was each house with its court surrounded by a wall, but the village itself was walled or hedged; and the parcels of plough land and meadow might be separated by balks, or even enclosed.[4] Sometimes after the harvest, as in England, the enclosures of the meadows and cultivated fields were removed, in recognition of the communal

[1] *Revised Statutes of Ill.*, 1885, pp. 1308, 1330–1, 1310, etc.

In New York one, two, or three commissioners are elected for each township; if three be chosen the term is for three years, one retiring annually: *Revised Statutes*, I, 808, 843. They may be constituted a board when the people so determine: Ib., II, 1212 ff., 1227–8.

[2] *Compiled Laws*, 1885, pp. 993–4.

[3] *Supplement to Revised Statutes*, 268. In Missouri the township board of directors performs substantially the same duties: *Township Organization Law*, 12, 34–46.

[4] Maurer, *Einleitung*, 23, 24, 37, 77, 80; Seebohm, *Eng. Vil. Com*, 3, 4, 12, 19, 20.

right of pasturage.[1] Doubtless from the very beginning the mark-moot or the mark officers were invested with jurisdiction in all contentions and questions relating to division lines.

At regular intervals, once or twice each year, all the inhabitants were wont to make a solemn *pireisa*[2] or procession of the boundaries of the mark, in order to restore them where necessary and fix them in memory.[3] In later days the ceremony gained a religious character. The priest led the procession and performed sacrifices on altars placed near the borders. When the Germans were converted, the christian priest took the place of pagan, and the heathen sacrifice was supplanted by the mass.[4]

(*b*).—*Parish Perambulations and Haywards.*

The ceremony just described is identical with that of the famous "perambulation of the parish" which prevailed throughout the early ages, and indeed still prevails, in England. It should be remembered that the parish, like the mark and the early township out of which it grew, had no surveyed boundaries. It originated in the settlement of a community on a portion of the unoccupied land. Tradition aided by marks or tokens, such as trees or rocks, was the only record of the territory actually belonging to each parish. The following

[1] On the "Lammas meadows" see Maine, *Village Communities*, 85–7; Seebohm, *Eng. Village Communities*, 11, 109–10; Nasse, *The Agricultural Community of the Middle Ages*, 49; Williams, *Rights of Common*, 80; Elton, *The Law of Commons and Waste Lands*, 28, 36, 156; Scrogge, *Courts-Leet and Courts-Baron*, 165.

[2] *Pireisa*, *Bereisung*, means a travelling of the boundaries. The procession was also called *underganc* and *umbeganc:* Grimm, *Rechtsalterthümer*, 546.

[3] Grimm, *Rechtsalterthümer*, 545. The boundaries of the mark were indicated by stones, trees with crosses cut in them, and the like.

[4] Laveleye, *Primitive Property*, 119.

extract from Toulmin Smith will throw light, both on the origin of the parish, and the need of constantly "beating the boundaries."

"There is little doubt that every original settlement in England, such as now constitutes a parish, was once surrounded by waste or common land; which separated it on all sides from adjoining settlements. Its own girdle of waste belonged to each, though not settled on with rights of private proprietorship. A common highway often ran between. Up to the middle of this highway, which forms the actual boundary, each parish is the rightful owner.

"The very extensive enclosure of commons of late years has obliterated a vast portion of this waste land. Still, very many parishes even yet show large traces of it. And it has probably been by detached settlements having been made in this waste, at one time and another, while the parent parish has not been sufficiently careful of its boundaries, that those parts of parishes which are often found as outlyers, have got separated from the main part. The intermediate parts remained, properly part of the parish, though waste. But through want of careful perambulation, neighboring and more sharp-sighted parties have been let engross piece after piece of the waste—both what thus became intermediate and what remained engirdling—till several parts of the parish have become perhaps isolated, and much may have become lost round the margin. Those practically familiar with parish affairs, can often point to specific pieces and plots which they remember, or know by tradition, to have been formerly reckoned, without question, as within their parish, but which a neighbor parish is now in possession of."[1]

The perambulation was formerly made every year, but now less frequently.[2] On the occasion of the ceremony the male population, young and old, turns out *en masse*. It is their duty to trace very carefully every foot of the boundary,

[1] Smith, *The Parish*, 543–4.

[2] Smith, *The Parish*, 545.

though ladders need to be used in climbing over buildings and other obstructions. The parish officers and old men take the lead, followed by the young men and boys. It is desirable to have as many boys as possible. At each "boundary-mark" a halt is made, and the boys beat the mark with wands to impress its location on their memories. This seems to be a far less efficient mode of creating an "impression," though doubtless more agreeable to the boys, than the custom still prevailing on like occasions in some German communities of soundly beating the jackets of the boys themselves with the aforesaid wands.[1]

Smith observes that "in many places throughout England, there are ancient trees, or the places where they once stood, known, each, by the name of 'gospel oak.' . . . They were called thus, because when the parish bounds were gone round, the people halted at each mark and a religious sanctity was given to it by the denunciation there of curses upon him who should remove the landmark. It is not unworthy of note that while superstitious ceremonies were so strongly censured at the time of the Reformation, the important and vital ceremony of perambulation was expressly excepted."[2]

It may be added that it is no less remarkable, that the practice of invoking curses on the disturbers of landmarks

[1] The custom is still maintained in Bavaria and the Palatinate: Laveleye, *Primitive Property*, 119; also in Russia: Wallace, *Russia*, 366. The practice, though remarkably prevalent in Bavaria, existed elsewhere on the continent; "Even in the past century, in many parts of Germany the custom prevailed, on important occasions such as the laying of a foundation, the fixing of a boundary stone, the finding of a treasure or the like,—of taking boys and unexpectedly boxing their ears or snipping their earlaps, *die ohrlappen pfetzen*, in order that they might remember the occasion all their lives. At the same time they received small presents:" Grimm, *Rechtsalterthümer*, 143–6, 545. Sometimes, however, the boys were thus treated in the presence of the real witnesses: so, according to the law of the Ripuarian Franks, *Legis Ripuariorum*, Tit. LX, 1, Walter, *Corp. Juris Germ.*, I, 184. Cf. Grimm, *Rechtsalt.*, 145.

[2] *The Parish*, 549 note.

prevailed not only among the Germans[1] but also among the ancient Romans[2] and Hebrews.[3]

In England the watch over the fences of the community was the duty of the hayward, an officer of great antiquity. The name itself *hege-weard*, hedge ward, suggests an Anglo-Saxon origin. Two haywards, at least in later times, were sometimes chosen by the vestry meeting;[4] but in the middle ages they were elected in the court leet, and the office was essentially constabulary.[5] The hayward seems sometimes to have performed the duties of pound-keeper, in clearing the streets and common of stray animals and driving them to the pound; though the common driver, or pound-keeper, is usually found side by side with him. The latter officer was also originally a kind of constable appointed in the leet; and the functions of both common driver and hayward were ultimately inherited by the parish beadle.[6]

[1] The boundary stones and trees were inviolable: no one dare cut a leaf or a twig from the latter. The folk-songs represent the spirits of those who had disturbed boundary stones as accursed, and doomed to wander about the fields. Fearful punishments were denounced upon those who should intentionally plough out the boundary stones. Such an one, for example, was to be buried up to the neck, in a hole where the stone had stood, and then a new plough drawn by four horses should be dragged over him until his neck were ploughed asunder: Grimm, *Rechtsalterthümer*, 546–7.

[2] Such may be the significance of the legendary death of Remus, and of the inviolability of the *pomoerium*. A festival in honor of Terminus, the god of boundaries, was held at Rome in February of each year: Marquardt, *Röm. Staatsverwalt.*, III, 202.

[3] "Cursed be he that removeth his neighbor's landmark: and all the people shall say, Amen:" *Deut.*, Chap. XXVII, 17. Compare *Deut.*, Chap. XIX, 14; *Proverbs*, Chap. XXII, 28; *Job*, Chap. XXIV, 2. "The princes of Judah were like them that remove the bound: therefore I will pour out my wrath upon them like water:" *Hosea*, Chap. V, 10.

[4] See *Records of Ardly Parish* (1707) quoted by Toulmin Smith, *The Parish*, 526.

[5] Smith, *The Parish*, 192, note.

[6] Smith, *The Parish*, 192, 528–9.

(*c*).—*Perambulators and Fence Viewers in the New England and Middle Colonies.*

The township of New England, territorially, came not into existence in quite so undefined or natural a way as did the parish in the mother country. On the other hand there was no normal area which each should contain, nor any fixed and readily ascertainable boundaries, such as were secured in advance for the townships west of the Alleghanies by the ordinance of 1785. The grant of land for the planting of a new town was made, as we have already seen, by the general court; and its bounds were "set out" by committees appointed by that body. The same procedure was observed in grants to individuals. The boundaries were indicated by stones, trees, or similar marks, precisely as in the primitive ages; and the neglect to renew such tokens soon led to serious difficulties.

Thus, in 1675, Plymouth found herself in the embarrassing position of not knowing what part of her public domain she had actually granted to towns or individuals. A committee of the general court was therefore appointed to coöperate with local committees in determining the bounds of all such towns as bordered upon the "commons or undisposed lands."[1]

Massachusetts was already beginning to encounter the same difficulty in 1647, when she met it by the institution of triennial perambulations. In that year the general court, reciting that by reason of "deficiency and decay of markes . . . greate iealousies of p'sons, troubles in townes & incumbrances in Co^rts doth oft arise," ordered that every town should set out its bounds within a twelve month after such bounds are granted; and "y^t w^n their bounds are once set out, once in three yeares 3 or more p'sons of a towne, appointed by y^e select men," with like committees of adjacent towns, shall "go y^e bounds betwixt their said townes and renew their markes, w^ch

[1] *Plymouth Col. Rec.*, XI, 240.

marks shalbe a greate heape of stones or a trench of six foote long & two foote broade, y^e^ most ancient towne to give notice of y^e^ time & place of meeting for p'ambulation, w^ch^ time shalbe in y^e^ first or second month, upon paine of 5^l^ for ev^r^y towne y^t^ shall neglect y^e^ same."[1]

It is noteworthy that in New England the perambulation ceased to be a democratic proceeding, and became an ordinary representative act of administrative authorities; and so in Boston, and doubtless elsewhere, the persons nominated by the selectmen for this duty received the official title of "perambulators."[2]

[1] *Mass. Col. Rec.*, II, 210. Individual proprietors of land lying in common were required to perambulate yearly. Cf. *Acts and Resolves*, I, 64–5.

[2] *Boston Town Records*, 1634–60, p. 95; 1660–1701, pp. 214, 234, etc. The following is a report of the Worcester perambulators filed for record, April 30, 1771:

"Began at a Black oak tree at the West Corner of the upper End of the Long Pond so Call^d^ thence to a heap of Stones in the fence betwixt Capt Jenisons Feild & Capt Curtis's feild Leading Northward to the County Road from thence to a Dead Walnut Stump y^e^ Nor-East Corner of Capt Jenisons rye feild from thence to a maple tree in m^r^ Phin Heywoods Entervail from thence to a heap of Stones a Little Nor-west of Jon^a^ Lovels Dwelling House from thence to a heap of Stones nor-westerly of a Little Bridge Crossing a Little Brook in the Road Leading to Jonas Wards thence to a Walnut tree in the fence Betwixt Land of Leuit Josiah Peirce & Phinehas Heywood from thence to a heap of Stones y^e^ nor-Easterly Corner of Leiut Josiah Peirces Land thence to a Pine tree Betwixt Land of the Wid^o^ Hancock & David Child from thence to a Yong Swamp oak being the nor- of Worcester East Corner & South East Corner of Holden which marks we have Renewed this Day

Josiah Peirce, Samuel mower, Sam Brooks, Worcester Comittee
Zeb Johnson Edward Flint Shrewsbury Comittee."

It is evident that frequent renewal would be necessary to preserve boundaries, thus established on principles but little more certain than the spelling or capitalization of the worthy perambulators.

The same method of describing boundaries is employed in Anglo-Saxon charters: compare the description of Hordwell, granted in the tenth century to Abingdon Abbey by Edward the Elder, in Seebohm's *Eng. Vil. Com.*, 107. Good illustrations will also be found in Birch, *Cartularium Saxonicum*, I, pp. 539–40, etc. See Kemble's *Codex* and Thorpe's *Diplomatarium*, pp.

Fence viewers, under a variety of names, appear as elective officers in all the New England town and colonial records.[1] Some illustration of their duties has already been presented;[2] it will therefore only be necessary here to call attention to the differentiation of the office.

Thus in Boston during the early period "fence viewers" and "haywards" are used as identical terms;[3] but in the eighteenth century both fence viewers and haywards were elected, and the latter officers performed the functions of the earlier "cow-keepers."[4] Braintree had both fence viewers and haywards and the latter are mentioned in the records as identical with the "field drivers."[5] Both officers existed side by side in Lancaster, and the "hawyard," as he was there called, was probably a cow-keeper.[6] In Dorchester fence viewers were nominated for particular fields, and sometimes upwards of a score shared the honors among them.[7]

Turning now to the middle colonies, we find that in New York by the Duke's Laws, the constable and overseers of each township were authorized to appoint "one or two or more of the planters for all or each common field belonging to the town where they dwell."[8] Triennial perambulations, conducted by three overseers of the town nominated by the next justice of the peace, were also instituted.[9] By the Prov-

109, 132, 145, 160, etc. The mode of describing manorial boundaries wherever the open field system prevailed is discussed by Seebohm in his *Eng. Vil. Com.*, 9, 111, 328 ff., 375, etc.

[1] See *New Haven Col. Rec.*, I, 150, 155; II, 579; *Conn. Col. Rec.*, I, 381.

[2] Chap. II, v, (*a*).

[3] *Boston Town Records*, 1660–1701, p. 222.

[4] Thus in March 1763/4 six fence viewers and one hayward were chosen: *Boston Town Records*, 1758–1769, pp. 82–3.

[5] See, for example, *Braintree Town Records*, 29, 61, etc.

[6] Nourse, *Early Records of Lancaster, Mass.*, 188, 202.

[7] So in 1672 there were 13, and in 1679, 18 fence viewers: *Dorchester Town Records*, 191–2, 230. In New Haven the fence viewers might be appointed for particular fields: *Col. Rec.*, II, 579.

[8] *Duke's Laws*, 15.

[9] *Duke's Laws*, 13.

ince laws every town was empowered to elect three fence viewers annually; and the freeholders of every town, manor, and precinct, at any annual meeting, or at such time and place as might be designated "under the hands and seals of any two of his majesty's justices of the peace," were authorized to make such prudential orders relating to fences or the impounding of cattle as they should deem proper, which orders must be entered on the record.[1]

In Pennsylvania fence viewers for the county at large were appointed by the county court.[2]

(*d*).—*Virginia Processioners.*[3]

The old English perambulation appears in Virginia under the new name of "processioning" and primarily for a new purpose, namely, to determine the boundaries, not of the parish, but of private estates.[4]

A law was passed in 1642–3 confirming the boundaries of holdings and providing that no one should be compelled to resurvey his estate.[5] The evident object of the act was to prevent hardships from arising through the carelessness or incompetence of different surveyors.

But in 1761–2 it was found necessary to resort to some plan for determining and periodically renewing boundary lines. The preamble of an act of that year, after mentioning

[1] Van Schaack, *Laws of New York*, 1691–1773, I, 3, 289.

[2] *Charters and Laws*, 1676–1700, pp. 178–9, 207.

[3] The noun processioner, as well as the verb procession, was in use: See *Acts of the General Assembly of Va.* (1792), p. 158.

[4] However, in 1665, it was ordered that, "whereas there is a law that binds us to the bounding of our lands," the same law shall be in force "to the bounding of parishes and counties:" Hening, *Statutes*, II, 218. I have not noticed any further mention of the matter, and cannot say whether the law was ever carried into effect.

[5] Hening, *Statutes*, I, 262–3; renewed in 1657–8: *Ib.*, 459.

the inadequency of the statute just cited, declares that though the "surveighs be just yet the surveighors being for the most part careless of seeing the trees marked, or the owners never renewing them, in a small time the chopps being growne up, or the trees fallen, the bounds become as uncertain as at first, and upon a new surveigh the least variation of a compasse alters the scituation of a whole neighborhood and deprives many persons of houses, orchards, and all to their infinite losse and trouble." Therefore, for a remedy, it was enacted that within twelve months thereafter "all the inhabitants of every neck and tract of land adjoining shall goe in procession and see the marked trees of every mans land . . . renewed, and the same course to be taken once every fower years." In case of any difference which the people themselves cannot adjust, "two honest and able surveyors shall in the presence of the neighbour-hood lay out the land in controversie."[1] For preserving the bounds when thus established a different plan of processioning was instituted, which, with slight variations from time to time, was maintained to the present century. The procedure was as follows:

Every fourth year, sometime between the first day of June and the first day of September, it was the duty of the county court to direct each vestry to divide their parish into so many "precincts" as they should find convenient "for processioning every particular person's land," and to designate the time when the processioning should occur in each. For every precinct the vestry was required to appoint "two or more intelligent honest freeholders" to see such processioning performed, and to render a report to the vestry of every man's estate processioned, together with the names of such persons as should be present at the time. The reports of the various precinct processioners were registered by the vestry clerk. Notice of the persons and times designated for processioning

[1] Hening, *Statutes*, II, 101–2.

the respective precincts was given by the churchwardens at least three Sundays in advance.[1]

After the Revolution the duty of dividing the parish into precincts and of appointing processioners devolved upon the county court.[2]

In Virginia no officer for the viewing of fences existed; but in case of settlement of damage for trespass of animals, special viewers might be nominated by any justice of the peace;[3] and the same practice prevailed in South Carolina.[4]

(*e*).—*The Western Fence Viewer.*

The statutes of the group of states under discussion are very similar in their provisions relating to fences and fence viewers. In no instance is a separate officer for this branch of local administration chosen, the functions of overseer devolving *ex officio* upon the town board or some other authority.[5]

The principal duty of the modern viewer is the settlement of controversies concerning division or line fences. In such cases, as provided by the Nebraska statute, each party may

[1] Hening, *Statutes*, V, 426–7 (1748). See other acts in *Ib.*, III, 325–9 (1705), 529–534 (1710). Compare Slaughter, *Bristol Parish*, pp. xviii, 18; Channing, *Town and County Govt.*, 51.

[2] *Acts of the General Assembly* (1792), p. 158.

[3] Hening, *Statutes*, I, 458; VI, 38–9.

[4] South Carolina *Statutes at Large*, II, 81–2 (1694).

[5] The duties of fence viewers are performed by the township auditors in Pennsylvania: Brightly's Purdon's *Digest*, I, 803–4; by the trustees in Ohio, Indiana, and Iowa: Williams, *Revised Statutes of Ohio*, 1886, I, 884–7; *Revised Statutes of Indiana*, 1881, p. 1287; McLains, *Annotated Statutes of Iowa*, I, 90, 414–18; in Michigan and Wisconsin, by the overseer of highways: Howell's *Annotated Statutes*, I, 265; *Revised Statutes of Wis.*, 1878, pp. 429–33; in New York and Illinois, by the assessor and commissioners of highways: *Revised Statutes*, I, 808, 829–33; *Revised Statutes of Ill.*, 1885, pp. 719–22; in Kansas, by the trustee, clerk, and treasurer: *Compiled Laws*, 1885, p. 446; in Minnesota, by the town supervisors: *Statutes*, 1878, pp. 169, 291–4; in Nebraska, by the justices of the peace in each precinct or township: *Compiled Statutes*, 1887, p. 48.

select a fence viewer, or if either refuses, then both may be chosen by the other. In case of disagreement the two are to select a third. They are empowered to subpoena and examine witnesses; and, when required, it is their duty to determine the share of the division fence which each interested party should build, and to assess damages due either party for neglect of the other to repair or construct his share of the fence, or for throwing open his field by removal of the division fences, except during the proper season and after legal notice.[1]

In the West the perambulation and the processioning are unknown. In place thereof may be seen only the land surveyor with his tripod and his unromantic retinue of chain-men and stake-drivers.

X.—The Township in the East and South.

(*a*).—*The Present Constitution of the New England Town.*

Township organization as it exists in the West has been treated in this chapter as the latest phase of institutional evolution, following immediately upon the forms developed during the colonial period. And this limitation of the subject appears to be justified by the facts. In the South some progress has been made, but it consists largely as we shall presently see, in the introduction of the rudiments of the western township-county system. Likewise in New England, local government has not remained absolutely stationary for a century. Changes have occurred; but they are rather changes in spirit than in form: alterations in the sphere of its operation—as through the rise of cities and new administrative methods—rather than in constitutional structure.

Outwardly the New England township is much what it was in the eighteenth century. It is still the constitutional and political unit. The town-meeting is called under authority

[1] *Compiled Statutes of Neb.*, 1887, pp. 47–49.

of the selectmen's warrant as in early days,[1] but a newspaper advertisement may take the place of the personal "warning from house to house."[2] When assembled, the freemen elect their moderator and proceed to deliberate and enact by-laws for the regulation of their prudential affairs, in the ancient manner,[3] though the democratic spirit may be less pronounced[4]

[1] *Public Statutes of Mass.*, 1882, p. 232.

[2] The following notice, clipped from a Connecticut newspaper, will reveal the character and procedure of a modern New England town-meeting, but for a township including a "city" within its limits:—

"The legal voters in town-meeting in the Town of Norwich are hereby warned to meet in their several voting districts as by law provided, to wit: First District, at the Town Hall in the City of Norwich. Second, at Neptune Engine House, No. 5, West Side;" and, similarly, the three remaining districts are to meet at various places, "on Monday, Oct, 4th, 1886, at 7 o'clock in the forenoon, to elect the town officers for the ensuing year, which are by vote of the town elected by ballot. Also to choose by ballot two electors to be Registrars of Voters for the ensuing year. Also to elect three members of the Board of School Visitors for three years. Also, to ballot to determine whether any person shall be licensed to sell spirituous and intoxicating liquors in this town.

And at the *Town Hall*, at 3 o'clock in the afternoon, to elect all other officers not chosen by ballot; to hear and act upon the report of the Selectmen, and the recommendations therein concerning the purchase of Gravel Banks for repairs to highways, Burial Place at the Alms House, and the appropriation for re-writing the General Indexes of the Land Records of the Town. Also to hear and act upon the reports of the Treasurer of the Town, the Treasurer of the Town Deposit Fund, and the School Visitors; to grant salaries; to lay a tax to meet the expenses of the Town, and for the payment of State Taxes, and for the support of Common Schools." Also to act upon the question of discontinuing, changing, and laying out of certain highways, to establish the present alms house as a work house, and "to designate places for the erection and maintenance of Public Sign Posts, within the limits of the Town.

JOHN T. BROWN.
JABEZ S. LATHROP.
THURSTON B. LILLIBRIDGE.
Selectmen."

[3] *Public Statutes of Mass.*, 1882, p. 228. But by-laws, before taking effect, must be approved by the superior court, or, in vacation, by a justice of that court, and the approval must be recorded: Ib. 229.

[4] Compare Hosmer, *Samuel Adams, The Man of the Town-Meeting*, 16, 55; and his *Samuel Adams*, 418 ff., in the *American Statesmen Series.*

and the statutes may attempt a more precise enumeration of their powers, than in early times.[1]

The selectmen, as the town representative, continue to discharge a great variety of important functions. In Massachusetts, for example, in addition to a vast number of executive duties, they still exercise the right of appointment to various posts. By them are filled vacancies in the office of town treasurer, constable, field driver, fence viewer, and surveyor of highways; they may nominate policemen with constables' powers;[2] appoint firewards, inspectors of hay, milk, petroleum, or vinegar; and act as assessors and overseers of the poor in towns where no such officers are chosen.[3]

The list of town officers is still formidable; and even among those whose appointment is specifically authorized by law will be recognized some of the most primitive functionaries.

In Rhode Island, for instance, each town at its annual meeting, is permitted to elect a moderator, a clerk, a treasurer, a sergeant, and a sealer of weights and measures; also a town council consisting of from three to seven members; one or more auctioneers, one or more collectors of taxes, corders of wood, packers of fish, and pound-keepers, respectively; not less than three nor more than seven assessors; "and as many constables, overseers of the poor, viewers of fences, gaugers of casks, and all such other officers as by law are required . . . , and as each or any town shall have occasion for, including persons to superintend the building of chimneys and placing of stoves and stove pipes."[4]

[1] See *Public Statutes of Mass.*, 1882, p. 227, for an enumeration of the purposes for which each town may levy taxes.

[2] Except as to certain civil matters.

[3] *Public Statutes of Mass.*, 1882, pp. 236–7, 264, 372–6, 381, 385. In Massachusetts 3, 5, 7, or 9 selectmen are chosen in each town: Ib., 235.

[4] *General Statutes of Rhode Island*, 1872, pp. 93–95; *Public Statutes*, 1882, p. 109.

The following town officers are authorized by statute in Connecticut: a clerk, treasurer, collector, surveyor of highways, and register of births,

Nevertheless, in practice, the excessive functionalism, which constituted so peculiar an element of early New England life, is largely a thing of the past. The pounders, field drivers, and haywards of the ancient manor are still perpetuated in name; but in reality they seldom have any duties to perform.[1]

But, on the whole, the people of New England have clung with remarkable tenacity to the customs and organization of the primitive town. Traces of the village community still exist:[2] the selectmen or their agents continue to make periodical perambulations of the township boundaries;[3] and the proprietors of common fields are still authorized to hold

marriages, and deaths; also 2 to 7 selectmen, 1 to 5 assessors, 1 to 5 members of the board of relief, 2 to 6 grand jurors, not more than 7 constables, besides haywards, gaugers, packers, sealers, a pound-keeper for each pound, and other customary town officers: *General Statutes*, 1875, p. 24; *General Statutes*, 1888, p. 12. Since 1850 each town may also elect as many justices of the peace as it has grand jurors: see Constitution, Art. 5, and Amendments, Art. 10: *Gen. Stat.*, pp. LII–LVIII, 35.

Similar officers are authorized by law in Massachusetts and New Hampshire: *Public Statutes of Mass.*, 1882, p. 235; *General Laws of New Hamp.*, 1878, p. 118.

[1] The hog-reeve has survived to the present century; and to confer that title upon a prominent personage is sometimes regarded as a good political joke. The following communication from Mr. S. L. Geisthardt, formerly of Norwich, Connecticut, may prove instructive:

"The functions of *packers* seem to be somewhat vague and undetermined, as the laws relating to them are scattered and often badly worded. Their duty appears to consist in seeing that fish and meats are packed according to law,—with a suitable quantity of salt, the vessels of full weight, etc. In practice I have never heard of a packer exercising the powers of his office or having anything to do.

"The duty of *hayward* is to arrest estrays on the public highways and deliver them to the pound-keeper. As most towns no longer have a town pound, but every farmer is a pound-keeper, and as every person has the right to arrest and impound estrays; and since, moreover, the laws on the subject are never enforced in rural districts,—the office of hayward is not of great importance or distinction."

[2] See Dr. Adams' *Germanic Origin of New England Towns*, 33 ff., and his *Village Communities of Cape Ann and Salem*, 60, etc.

[3] *Public Statutes of Mass.*, 1882, p. 226. The perambulation is to be made every five years.

meetings for the enactment of by-laws and the election of officers[1] who are expressly recognized by the courts as quasi public functionaries.[2]

Finally, in two important particulars the persistence of the popular belief that the township is adequate to satisfy all the requirements of local self-government, has prevented the development of a simple and well-balanced administrative system such as is the pride of the western states.

The advantages of the county as a political body are not yet appreciated. Throughout New England, and more particularly in Massachusetts, that institution has at present even less political and administrative significance than it possessed in the seventeenth and eighteenth centuries.

Again, resistance to representative centralization has retarded the healthy growth of municipal bodies, and brought about that singular mixture of town and city government which furnishes so curious a chapter in the institutional history of Connecticut.[3]

[1] "The proprietors of land in any common field may meet at such time and place as they shall appoint, adopt regulations with respect to the fencing and occupying such common field, and do everything necessary for its management; and may choose a clerk, a committee to manage their affairs, fence viewers, and haywards who shall be sworn. . . . In any meeting such proprietors, each of them or his lawful agent, shall be entitled to give one vote for each acre of land which he may own;" and taxes may be voted in the same way. "Said proprietors may prescribe penalties for any violation of their standing rules; but no penalty shall exceed three dollars:" *General Statutes of Conn.*, 1875, pp. 210–12; Edition of 1888, p. 500. Massachusetts has a similar law: *Public Statutes*, 1882, pp. 595–97. The common proprietors are a corporation in Massachusetts, but not in Connecticut.

[2] According to *35 Conn.*, p. 247.

[3] New Haven affords a remarkable example. See Dr. Levermore's *Republic of New Haven*, 228 ff. Boston clung to her government through the town-meeting until 1822, when the city had 40,000 inhabitants and 7,000 legal voters. The history of the struggle in Boston for the establishment of a municipal constitution is very instructive. See Quincy, *Municipal History of Boston*, Chap. II; and Bugbee, *Boston Under the Mayors* in *Mem. Hist. Bost.*, III, 219 ff. The rise of the city in New England will be discussed in the second volume of this work.

In Massachusetts the necessity of discriminating between the village and

(*b*).—*The Reconstruction Township.*

The manorial and parochial systems, which in some measure had met the requirements of self-government in the southern colonies, did not survive the Revolution.[1] The county acquired still greater powers as the unit of administration, and retained them until the Civil War.

But during the period of "reconstruction" an experiment was tried in Virginia which is exceedingly interesting from an institutional point of view, if for no other reason, because it supplies a remarkable illustration of the principle that social organisms cannot be created, or transplanted to an unfavorable environment by the hand of the legislator.[2] Not in this way were the ideals of Thomas Jefferson or Richard Henry Lee to be realized.

The Virginia constitution of 1869[3] was drafted by a con-

the rural portion of the township finds expression in a law authorizing a village or district having not less than one thousand inhabitants, to organize under a name approved by the town for the maintenance of lamps, libraries, sidewalks, and police; to have a "prudential committee," a clerk, treasurer, etc.; and to adopt by-laws: *Public Statutes*, 1882, pp. 230–231.

[1] The parish system in the "low country" of South Carolina, however, was in part maintained until the Civil War: Ramage, *Local Govt. and Free Schools in South Carolina*, 20–22.

[2] For the materials of this account of the reconstruction township of Virginia, I am principally indebted to Mr. Jesse H. Holmes, of Washington, who, at my request, made inquiry, personally or by letter, of prominent Virginians, particularly of Hon. J. Randolph Tucker, Senator Mahone, Mr. E. E. Mason of Fairfax County, Hon. R. A. Brock, secretary of the Southern Historical Society, and Mr. Hugh R. Holmes of Loudon County.

[3] "This constitution was framed by a convention, called under the reconstruction acts of Congress, which assembled at Richmond July —, 1867, and completed its labors April 7, 1868. It was not submitted to the people until July 6, 1869, (under the authority of an act of Congress approved April 10, 1869) when clauses relating to the test-oath and to disfranchisement, which were separately submitted, were rejected, and the remainder of the constitution was ratified by 210,585 votes against 9,136 votes": Poore, *Charters*, II, 1952 note. Cf. Munford's *Introduction* to the *Virginia Code*, 1873, pp. 25–30, who states that 97,205 negroes and 125,114 whites voted. See also McPherson, *Hist. of Reconstruction*, 333, 374.

vention composed largely of northern men, elected, it would seem, partly by the aid of the recently enfranchised negroes, and presided over by Judge John C. Underwood, formerly of New York.[1] By that instrument provision was made for representative township-county government on the New York plan. The township boundaries were made to coincide with those of the "magisterial districts," which had been created for the election of justices of the peace under a clause of the constitution of 1851.[2] A full corps of elective officers was provided for—a clerk, supervisor, assessor, collector, constable, commissioner of highways, overseer of the poor, and justices of the peace. There was also to be chosen an "overseer of roads" for each road district of the township;[3] and the township supervisors were to constitute the county board.

Manifestly the abrupt substitution of this the most elaborate of the three types of modern local organization for the simple system with which the Virginian had been familiar for more than two centuries was essentially absurd; and the hostility to it was aggravated by sectional bitterness and the fear that the negroes would obtain undue power in local affairs.[4]

[1] Underwood went to Virginia before the war, and during the war was appointed federal judge by President Lincoln.

It is estimated that about one third of the members of the convention of 1867–8 were New York men while more than one half were from the North. The list of members is contained in the *Virginia Almanac* for 1870. The test-oath was not applied in voting on the constitution, and consequently few were disfranchised. McPherson, *Hist. of Reconstruction*, p. 374, gives the number of whites "failing to register for any cause" as 16,343.

[2] See the township act in *Code of Va.*, 1873, pp. 438–61. It is important to observe that these districts were very large—sometimes comprising 600 to 1000 square miles.

[3] It seems that there was also a "superintendent of roads": *Code of Va.*, 1873, p. 91 note.

[4] On this point Mr. Holmes writes: "Under the old form of magisterial districts the elections were managed by cliques centering at the county court house. Although the townships were the same territorially as the districts, they controlled their own local matters and the county seat poli-

The system was therefore abrogated by the constitutional amendment of 1874;[1] but as a substitute it was provided that each county should be divided into not less than three magisterial districts, in each of which should be chosen biennially a supervisor, a constable, an overseer of the poor, and three justices of the peace. The supervisors were still to constitute the county board, and every magisterial district was to be divided into school districts in each of which one trustee should be elected or appointed annually for a term of three years.[2] Thus, though the word township was erased from the statute book, an important innovation in the ancient local constitution was effected; and the change was entirely favorable to the further development of the spirit of representative self-government in Virginia.[3]

In West Virginia a similar system of local organization was instituted under the constitution which went into effect on the admission of the state in 1863.[4] But it is entirely abrogated by that of 1872, except that justices and constables are still elected in the magisterial districts which correspond territorially to the former townships.[5]

ticians lost their hold on the voters and could not manage the negroes so well. Then in some parts of the state the people never understood the new system at all."

[1] The constitution of 1870 is regarded by the Virginian as an importation accepted by a conquered people. However the township system met with favor in some places: the amendment of 1874 was rejected in Fairfax County by seven hundred majority, but here a large element of the population was of northern origin. The repeal was made a Democratic party measure.

[2] Poore, *Charters*, II, 1974–5. Cf. *Acts of the Assembly*, 1874–5, pp. 354–64. The magisterial districts were identical with the former townships; but their boundaries might be altered by the county court on petition of fifty qualified voters: Ib., 56–8.

[3] The new system seems to have been successfully operated to the present time: see *Code of Virginia*, 1887, pp. 89, 396, etc.

[4] Poore, *Charters*, II, 1986; *Acts of the Legislature of West Virginia*, 1873, pp. 27–30, 48–52, 96–103.

[5] Poore, *Charters*, II, 2008, 2010. See also *Revised Statutes of West Va.*, 1879, pp. 170, 517.

Very similar was the reconstruction legislation of North Carolina. By the constitution of 1868, framed during the administration of General Canby, provision was made for a system of township-county organization modelled generally upon that inferior type which had its origin in Pennsylvania.[1] The county commissioners are authorized to divide the county into townships, in each of which shall be elected by the qualified voters a clerk, two justices of the peace, and a school committee consisting of three members. The clerk and justices are constituted the board of trustees, and as such, under supervision of the county commissioners, have control of the roads, bridges, and finances of the township. The clerk is *ex officio* treasurer, and the duties of assessor are performed by the township board.[2]

This system was incorporated in the revised constitution of 1876.[3] But by the latter instrument the general assembly is authorized to change or abrogate those sections of the seventh article by which the powers of the township are created. Accordingly by an act of 1876–7, justices of the peace are to be appointed for each township by the assembly; the nomination of the county commissioners is vested in the justices; the functions of the township trustees are devolved upon the commissioners; and the township ceases to be a body politic, except as its powers are exercised under the supervision of the county board.[4] The provision for the election of a township school committee is also abolished. Instead thereof every county, or in fact every township, is divided into school dis-

[1] The convention met at Raleigh, Jan. 14, 1868; completed its labors March 16, 1868; and the constitution was ratified the same year by a vote of 93,118 to 74,009: Poore, *Charters*, II, 1419. But McPherson, *Hist. of Reconstruction*, p. 374, gives the vote 93,084 for adoption, against 74,015.

[2] For the township law framed under the constitutional provision, see Battle's *Revisal*, 1873, pp. 829–33; *Const.*, Art. VII., Ib., p. 52.

[3] Poore, *Charters*, II, 1446.

[4] *Laws* of 1876–7, c. 141, pp. 227 ff. Cf. *Code of N. C.*, 1883, I, 280–1, 287, 322–3, etc.

tricts, for each of which a committee of three members is appointed by the county board of education.[1] A constable is elected biennially in each township.[2] Thus it appears that the reconstruction legislation is almost entirely undone, and the township is reduced to the rudimentary form of a precinct for the constable and justices of the peace.

But the germs of town government have been planted in the South; and under the gradually changing social and economic conditions, it is not unreasonable to believe that they will eventually be fostered into vigorous life.

XI.—The School District as a Differentiated Form of the Township.

Originally in New England, as we have seen, the township and the school district were identical. Teachers were employed, school laws enacted, and school rates levied by the town-meeting or its agents, just as other civil business was transacted. And the character of the school district as essentially a township has never been lost. Whatever its form, even when a small independent division of the county, as in many western states, its organism is always a reproduction of the township constitution. The subdistrict meeting is a *tungemot* in miniature; the clerk, treasurer, and moderator have the town officers as their prototypes; and the board of directors are but the selectmen of the district chosen to order its educational affairs.

In the adjustment of the constitutional mechanism of school administration, a great variety of expedients have been adopted. Perhaps nowhere else can so great flexibility of organism and so much freedom of local action be found.

[1] *Public School Law of N. C.*, p. 15; *Code of N. C.*, c. 15, sec. 2549.

[2] Act of 1879, c. 152, sec. 1: *Code of N. C.*, II, 177.

The township exists by name in South Carolina and Alabama; but in the former state it is merely a highway district, in the latter, a district for the maintenance of public schools: Ramage, *Local Govt. and Free Schools in South Carolina*, 26; *Code of Alabama*, 1886, I, 271–2.

Throughout the New England States a township system exists. A committee[1] for the general supervision of all the schools in the town is usually appointed; and as a rule, subdistricts are created and placed in charge of officers or committees of their own. In Rhode Island, Connecticut, and Vermont these local committees are elected by the voters of the respective subdistricts; but the town may at any time abolish the district system and assume entire control. And this has already been done in New Hampshire. Each township, in Vermont, has a superintendent, instead of a committee; and all the town superintendents of the county are required to meet annually to draft questions for use in the examinations of teachers and to choose a county board of examiners. If a town vote to abolish the district system, the superintendent is superseded by an elective board of directors.[2]

The township-subdistrict plan prevails also in New Jersey, Ohio, Pennsylvania, Michigan, Illinois, Wisconsin, and Iowa; but with important differences in constitutional details. Thus, in several states, each township has a representative board. In New Jersey it is composed of the district trustees; in Ohio, of the district clerks and the clerk of the township; in Wisconsin, of the district clerks alone; and in Iowa, of the district directors. In New Jersey the board is merely a consultative body called together from time to time for the purpose of conferring with the county superintendent relative to the management of the schools; but in each of the other states, it is entrusted with the general control of the district authorities.[3] On the other hand, in Michigan and Illinois both the town board and that of the district are elective and independently composed.[4]

[1] Called "school committee" or "committee of visitors."

[2] See *Report of Com. of Education*, 1885–6, pp. 152 (Rhode Island), 64 (Connecticut), 165–6 (Vermont), 126–8 (New Hampshire), 108 (Massachusetts), 104 (Maine).

[3] *Rep. of Com. of Ed.*, 1885–6, pp. 132 (N. J.), 141–2 (Ohio), 86 (Iowa), 185 (Wis.). See also Macy, *A Government Text Book for Iowa Schools*, 16–18.

[4] *Rep. of Com. of Ed.*, 1885–6, pp. 111–12, 80.

The school system of Dakota is unique. The law provides that "school townships" may be organized in each county whether civil townships are organized or not; and the school township may or may not correspond in name and area with the civil township. The officers of the school township are a director, clerk, and treasurer, and they have entire control of the schools therein, as the formation of subdistricts is expressly prohibited by law.[1]

In New York, likewise, a peculiar plan exists. Each county comprises one or more "school-commissioner districts," for each of which a commissioner is triennially chosen. It is the duty of the commissioner to divide his territory into a suitable number of districts; and the electors of each district are authorized to choose their own officers and manage their own educational affairs.[2]

Similar powers are generally possessed by school electors in that large group of states and territories where the system of single or independent districts prevails. Such is the case in Kansas, Nebraska, Minnesota, Missouri, Oregon, Nevada, Colorado, Arizona, Idaho, Montana, Utah, New Mexico, and Washington Territory.[3] In all of this vast region, for at least one important department, a spirit of vigorous self-government is being fostered. Every school district is a miniature democracy where the people, within certain limits, enact their own laws, levy their own taxes, and choose their own officers.

Moreover, the democratic school system of the North is rapidly finding its way into the South; and it is in this region that it is destined to have the most beneficent influence in developing habits of self-help. The school organization is there likely to prove the model which will eventually lead

[1] *Rep. of Com. of Ed.*, 1885–6, p. 194. Thus two systems exist in the territory: the independent district system and the township system; but the latter appears to be unsatisfactory: *Ib.*, 39.

[2] *Rep. of Com. of Ed.*, 1885–6, pp. 137–8.

[3] See the *Rep. of Com. of Ed.*, 1885–6, for each of these states and territories.

to a transformation of the entire civil body.[1] Already in Virginia, Kentucky, Texas, and Tennessee the people are choosing their own officers and, in some instances, voting their own taxes for the maintenance of common schools.[2] In Alabama the township has been instituted chiefly for this purpose.[3] Elsewhere, as in West Virginia, North Carolina, South Carolina, and Georgia, free schools exist; but the system is less democratic.[4]

The school district, then, aside from its ostensible objects, is of great significance as a preparation for local self-government on a larger scale. Indeed, with respect to one question of national importance, it is likely to be the means of greatly widening the sphere of civil liberty and personal equality before the law. Already in a large number of states and territories, so far as school administration is concerned, the distinction of sex as a condition of the franchise no longer disgraces the statute book; and the results of the admission of women to a share in this branch of local government seem to be wholly salutary.[5]

[1] On the "school meeting as a preparation for the town-meeting" and its rise in the South, see Dr. Bemis' *Local Govt. in Michigan and the Northwest*, 19–24.

[2] *Report of Com. of Ed.*, 1885–6, pp. 170 (Va.), 97 (Ky.), 160–61 (Texas), 158 (Tenn.).

[3] *Code of Alabama*, 1886, I, 271–2; *Rep. of Com. of Ed.*, 1885–6, p. 47.

[4] In West Virginia the magisterial district is constituted a school district, and the trustees of the subdistricts are appointed by the district board: *Code of W. V.*, 1887, 399; *Rep. of Com. of Ed.*, 1885–6, p. 178. In South Carolina the subdistricts are laid out by the county board of examiners who appoint three trustees for each: *Ib.*, 155. In North Carolina and Georgia these powers are exercised by the county board of education: *Ib.*, 140, 76. In none of these states do the subdistricts possess the right of self-taxation.

[5] Women are eligible to school office in Nebraska, Colorado, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Vermont, Rhode Island, Michigan, Minnesota, New Hampshire, New Jersey, New York, Pennsylvania, Wisconsin, Dakota, Arizona, Wyoming, Utah, California, and Washington Territory. In Oregon, Kentucky, Idaho, and Indiana, women may vote on certain conditions: See *Report of Commissioner of Education*, 1880, p.

xxv; 1885–6, *Index at Women;* also Bemis, *Local Govt. in Michigan and the Northwest*, 24–5.

In 1870 a public school system was established in England. The parish, which had gradually been robbed of nearly all of its original civil powers, gained a partial compensation in being made the school district with the right to elect its own officers. But while the mother country was thus two centuries and a half behind her American colonies in making the support of education an essential feature of local government, in one respect she has far outstripped us. Not only are female rate payers possessed of the full school franchise; but they have the same suffrage as men in borough, vestry, and poor law union elections: See a good article in *Westminster Review*, July, 1888, on *Local Government: The Franchise Question.*

PART II

THE HUNDRED

CHAPTER V.

EVOLUTION AND DECAY OF THE HUNDRED ORGANISM.

I.—The Brotherhood or Ward.

(*a*).—*The Phratria.*

For many ages the hundred or its analogue occupied a place of some importance in the social organism; but in every phase it seems to have been more limited in functions and less natural in structure than either the higher or lower orders. Besides its early history is obscure and perplexing in the extreme. On this account any attempt to identify the prototype of the hundred, during the genealogical organization of Aryan society, must prove somewhat unsatisfactory. Still such fragmentary evidence as we do possess seems to establish a very strong probability that the Spartan *oba*,[1] the Ionic *phratria*,[2] and the Italic *curia*, occupying as they do the second place in the evolution of social groups, must be

[1] On the *oba* see Müller, *Hist. of the Doric Races*, II, 79 ff; Schömann, *Antiquities*, 211, 223; Grote, *History of Greece*, II, 361–2; Gilbert, *Handb. der griech. Staatsalterthümer*, I, 9, 44; Smith, *Dict. of Greek and Roman Ant.*, 1153.

[2] Phratries existed in Elis, Chios, Andros, Tenos, Ilion, Aigai in Mysia, Panormos, Messana, and elsewhere. *Suggéneia* has the same signification as phratria, and appears as a division of the people in Kalymna, Mylasa, Olymos, and Labranda: Gilbert, *Handb. der griech. Staatsalt*, II, 303. Cf. Müller, *Handb. der klass. Alt.*, IV, 20; Pauly, *Real-Encyclopädie*, V, 1566.

organically the same institution as that to which, for some special reason, the Germans gave a numerical designation.[1]

The Ionic phratria may be regarded as an expanded form of the genos, held together, like the latter, by the double bond of kinship and common worship; but the phratric union was probably less intimate and more frequently artificial than that of the families constituting a gens.[2] Such seems to be the general import of the celebrated fragment of Dikaearchos which represents the phratry as a union of different gentes formed through the practice of exogamy in marriage.[3] But if, originally, the phratries were pure genealogical groups, we may well believe, with Schömann, that at the first dawn of history they had already become localized;[4] for settlement in

[1] Cf. Freeman, *Comp. Politics*, 117; Fiske, *American Political Ideas*, 61.

[2] Grote, *Hist. of Greece*, III, 55. Cf. Gilbert, *Handb. der griech. Staatsalt.*, I, 110, who appears to hold that the entire Ionic system, except the genos, was more fictitious than is usually supposed.

[3] The fragment of Dikaearchos, a pupil of Aristotle, is preserved by Stephen of Byzantium, writing about 400 A. D. The original will be found in Wachsmuth, *Historical Antiquities*, I, Appendix, VII. Cf. also Gilbert, *Handbuch*, II, 302–3. The following is the substance of it as translated by Morgan, *Ancient Society*, 236:

"The Patry (Patra is used for genos) comes into being when relationship, originally solitary, passes over into the second stage [the relationship of parents with children and children with parents] and derives its eponym from the oldest and chief member of the patry, as Aicidas, Pelopidas."

"But it came to be called phatria and phratria when certain ones gave their daughters to be married into another patry. For the woman who was given in marriage participated no longer in her paternal sacred rites, but was enrolled in the patry of her husband; so that for the union, formerly subsisting by affection between sisters and brothers, there was established another union based on community of religious rites, which they denominated a phratry; and so that again, while the patry took its rise in the way we have previously mentioned, from the blood relation between parents and children and children and parents, the phratry took its rise from the relationship between brothers." This, of course, must be regarded, so far as the origin through exogamy is concerned, as merely the opinion of Dikaearchos. See Morgan, p. 237; Schrader, *Sprachvergleichung und Urgeschichte*, 383.

[4] Schömann, *Athenian Constitutional History*, 10–12.

compact bodies of kindred is precisely what we should expect in a people just emerging from the pastoral condition.

Very few constitutional details relating to the phratric organization have been preserved. According to Aristotle each of the ancient Attic phratries consisted of thirty genê while, in turn, three phratries united to form a tribe.[1] The latter number is undoubtedly correct, but no credence can be given the former, at least for the early period.[2] Each phratry had an elected president, the *phratriarchos*,[3] and an assembly with legislative powers.[4] Little can be said with regard to its early functions; but they seem to have consisted largely in the celebration of religious rites.[5] There is evidence, however, in the Iliad that each phratry sent its armed band to the gathering of the host. Nestor directs Agamemnon to separate the warriors according to phratries and tribes, that "phratry may support phratry and tribe support tribe."[6] If the poet in this passage merely credits to the wisdom of Nestor what was really a general custom, as is not improbable, then we have at least one striking analogy in functions between the phratry and the Teutonic hundred.

If under the primitive constitution the phratry was of less significance than gens or tribe, the reverse is true in the later period. By the Kleisthenian constitution the old religious genê and phulai were superseded for political purposes by new local divisions, and thereafter they pass almost wholly out of sight; but the phratry continued to discharge important functions. The phratriarchos performed duties analogous to those of a modern registrar of births and marriages. The names of all legitimate children, including those by adoption,

[1] Gilbert, *Handbuch*, I, 111 ff.; Müller, *Handbuch*, IV, 20.

[2] Schömann, *Antiquities of Greece*, 317.

[3] Such an officer existed under the Kleisthenian constitution and probably before: Gilbert, *Handbuch*, I, 200; Schömann, *Antiquities of Greece*, 321.

[4] So stated by Gilbert, *Handbuch*, I, 200, on epigraphic evidence.

[5] Fustel de Coulanges, *The Ancient City*, 154 ff.

[6] Iliad, Book II, 362. Cf. Morgan, *Ancient Society*, 237.

were inscribed in a record kept for the purpose, the ceremony of registration occurring in a meeting of the phratry held regularly on the third day of the Apaturian festival. "On the appointed day the father placed the child before the assembly, made the declaration upon oath that it was begotten by him in lawful wedlock, then offered a sacrifice to the deity of the phratria, and entertained the phratores at a sacrificial banquet."[1] In the same way the newly married wife was admitted to the phratria of her husband.[2] "It is possible also that youths were not pronounced of age until they had been presented to the phratria and, when necessary, subjected to a certain examination, which in the case of sons of heiresses to whom their mothers' property was to be delivered, or in the case of orphans who were now to be released from wardship, probably had special reference to the capacity requisite for the independent management of their property."[3]

(*b*).—*The Curia in its Relations to the Centuria.*

At the first dawn of legendary history we find the Roman people organized in gentes, curies, and tribes. Each of the three tribes was composed of ten curies and each curia, in turn,

[1] Schömann, *Antiquities of Greece*, 364; Boeckh, *Public Economy of the Athenians*, 689; Smith, *Dict. of Greek and Roman Antiquities*, 101; Grote, *Hist. of Greece*, VIII, 193; Forbiger, *Hellas und Rom*, V, 81, 114; Gilbert, *Handbuch*, I, 201.

[2] Schömann, *Antiquities of Greece*, 364.

[3] "The matter is however extremely uncertain:" Schömann, *Antiquities of Greece*, 364, note 4. Schömann holds that the old religious phratries were retained by Kleisthenes, and this seems to be the generally accepted view: Freeman, *Comparative Politics*, 105, 107; Morgan, *Ancient Society*, 238–9; Smith, *Dict. of Greek and Roman Antiquities*, at *Civitas* and *Tribus*. Gilbert, *Handbuch*, I, 142, note 3, however, maintains that Kleisthenes created new phratries as well as new demes and tribes.

See further on the phratry, Pauly, *Real-Encyclopädie*, V, 1566–7; Fustel de Coulanges, *The Ancient City*, 154–8; Wachsmuth, *Historical Antiquities*, I, 342 ff.

of a variable number of gentes.[1] Moreover it is worthy of note that the aggregate number of thirty curiae was maintained until the latest times.[2] Such numerical symmetry is usually regarded as indubitable proof of the artificiality of the Roman curiatic system; and Lange, interpreting the tradition of its creation by Romulus after the union of the Ramnes and Tities, regards it as a deliberate administrative expedient for securing an equal voice in the popular assembly to each of the members of the newly formed federal state.[3] Nevertheless, though the arrangement may have been somewhat arbitrary, it is highly probable that each curia was composed of a group of closely related gentes; and this supposition gains strength from the fact that a division into curies is found everywhere among the Italic races.[4] As we shall presently see, a certain degree of artificiality is not wholly incompatible with natural evolution.

When they first come before our view both curia and tribe have ceased individually to be of political significance, and their constitutions are in rapid process of decay. The tribe has no corporate organization at all—it is merely a name for a combination of curies; while the single curia is an organized body only for the celebration of the sacra. For this purpose each curia has a curio or president, a sacerdos or priest, and a flamen to aid in the sacrifice;[5] but the rites are usually celebrated simultaneously by the whole thirty curiae in a common

[1] The older view that each curia comprised just ten gentes probably arose from a misunderstanding of the *decuriae* mentioned by Dionysius (II, 7), which were divisions of the *centuria* and not of the curia: Mommsen, *Staatsrecht*, III, 92, 104.

[2] Mommsen, *Staatsrecht*, III, 99, note 3.

[3] " . . . eine offenbar zum Zweck gemeinsamer Beschlussfassung künstlich gemachte Gliederung des Staats, unter welcher die patriarchalische natürliche Gliederung der Stämme in *gentes* und *familiae* bestehen blieb . . . ": Lange, *Römische Alterthümer*, I, 90, 275. Cf. Mommsen, *Staatsrecht*, III, 100.

[4] Mommsen, *Staatsrecht*, III, 90, note 1. Municipalities were divided into curies and sometimes the number was ten: *Ib.*, 100.

[5] In the regal period these were all appointed by the king or pontifex; later by co-optation: Mommsen, *Staatsrecht*, III, 101.

building in which each has a separate space.[1] Accordingly the general supervision of the entire body is entrusted to a curio maximus probably chosen by the curiales at large.[2]

It is indeed remarkable with what persistence, almost jealous anxiety, every opportunity for independent political action on the part of the separate members of the social organism, was suppressed in favor of the people as a whole. Perhaps in no other way, can we realize so well how firmly the Roman, even in that early age, had seized upon the idea of federation. To assimilate the diverse elements of the new nation seems never to have been forgotten in the military and other administrative arrangements.[3] So the old tribes—once sovereign states—were almost entirely ignored, and the gentes only appear in the domain of private law.

But if, in like spirit, the curies, individually, were denied all political significance; collectively, they were the state itself. The curiatic assemblies were the national folkmoots in which the will of the *populus* found expression.[4] To these gatherings came client and plebeian as well as patrician, though the right of suffrage was long monopolized by the latter;[5] and, long after all important legislative and judicial powers had been transferred to the centuries and the tribes, comitia curiata continued to be held for the purpose of granting the *imperium*, the witness of testaments, and the administration of certain gentile rights.[6]

[1] See Lange, *Römische Alterthümer*, I, 276; Mommsen, *Staatsrecht*, III, 101.

[2] Lange, *Röm. Alt.*, I, 277; Marquardt, *Röm. Staatsverwaltung*, III, 194–5; Smith, *Dict. Ant.*, 377; Mommsen, *Staatsrecht*, II, 26.

[3] This idea is suggested by Mommsen, *Staatsrecht*, III, 100, 105, 108, 111–12.

[4] *Curia* is probably derived from *quiris*, meaning the "citizen-body"—Bürgerverband: Mommsen, *Staatsrecht*, III, 90, note 2. Cf., however, Lange, *Röm. Alt.*, I, 91; Corssen, *Aussprache*, I, 354–5.

[5] Mommsen, *Staatsrecht*, III, 92–4, 78; Ihne, *History of Rome*, I, 67. Cf. Lange, *Röm. Alt.*, I, 279–80, 401 f.

[6] Mommsen, *Staatsrecht*, III, 316–20; Lange, *Röm. Alt.*, I, 404 f.; Smith, *Dict. of Greek and Roman Antiquities*, 331–33; Ramsay, *Manual of Roman Antiquities*, 115–18.

But side by side with the curia there was another Roman institution whose name is the exact equivalent of that of the Germanic hundred. This was the *centuria*, known chiefly as a member of the so-called Servian constitution, though it originated long before. And here a very important and, until recently, most perplexing two-fold question arises: Is there any organic connection between the curia and the centuria; and does the centuria represent the same phase of constitutional evolution as the hundred? "It seems almost impossible," says Freeman, "but that the Teutonic *Hundred* and the Latin *Century*, in the earliest usage of each, must have answered to one another."[1] On the other hand, it would be a strange coincidence indeed, if the hundred, occupying as it does the same relative place in the ascending scale of social organizations, should not correspond to the curia. And that both these conjectures are true, seems to be established with almost absolute certainty by Mommsen in the third volume of his masterly treatise on the Roman *Staatsrecht*.

In the first place, it cannot be doubted that the curia even as it existed in the earliest historic times, was a local as well as a personal body: it was at once a district and a group of kindred gentes.[2] Secondly, the divisions of the primitive Roman army evidently corresponded to those of the land and people. Thus the infantry consisted of three thousand men or thirty centuries, ten from each of the three original tribes. The military unit, therefore, was the centuria;[3] and, while it is not positively so stated in the sources, the inference is

[1] *Comparative Politics*, 117–18.

[2] Mommsen, *Staatsrecht*, III, 94. Such is also the opinion of Lange, *Röm. Alt.*, I, 275–78.

[3] *Centuria* is derived from *centu-viria*, literally the *Hundertmännerschaft; vir* in the primitive language meaning "*warrior*." In like manner *decuria* is from *decu-viria:* Mommsen, *Staatsrecht*, III, 104, note 1; Corssen, *Aussprache*, II, 683.

unavoidable that it was the quota of men which each of the ten curiae of a tribe was required to furnish.[1]

In like manner, the curia was the unit of the cavalry organization, each curia being required to supply a *decuria* or squad of ten men.[2] The decuria of horsemen was placed in charge of a *decurio*, just as each company of infantry was commanded by a *centurio* or *centurionus*; but the ten decuriae of each tribe were also formed into a century.[3]

There was a further division of the army which is of peculiar historic interest, since it constituted a device for attaining a more complete blending or assimilation of the three tribal elements of which the federation was composed. Thus the centuries of foot soldiers were each subdivided into ten decuriae—three hundred in all. These decuriae were then combined in *turmae*, each of thirty men, in such a way that every tribe should supply an equal contingent. In the same manner the hundred decuriae of horsemen were combined in turmae each of thirty men. So the entire army may be regarded as consisting either of thirty centuries of infantry and three centuries of cavalry; or of one hundred turmae of the former and ten turmae of the latter.[4]

[1] "Dass *curia* und *centuria* sich verhalten wie der Aushebungsbezirk zu der ausgehobenen Mannschaft, wird ausdrücklich nirgends gesagt, so deutlich es aus dem Schema hervorgeht; doch erklärt Dionysius 2. 7 in diesem sinn die *curia* durch *φράτρα καὶ λόχος*:" Mommsen, *Staatsrecht*, III, 104, note 2.

[2] This is so stated by Festus, *De Verb. Sig. Epit.*, p. 55: celeres antiqui dixerunt, quos nunc equites decimus a celere, interfectore Remi, qui initio a Romulo iis praepositus fuit; qui primatus electi fuerunt ex singulis curiis deni, ideoque omnes trecenti fuere. Cf. Mommsen, *Staatsrecht*, III, 106.

[3] The *tres centuriae equitum* are often mentioned by Livy and other historians.

[4] However at a very early day the *turma* ceased to be used as a division of the infantry; but it long continued to be the unit of the equites, and thus, says Mommsen, "fürht uns das merkwürdige Bild des Ineianderaufgehens der drei Gemeinden wie im erstarrten Sturzbach lebendig vor die Augen": *Staatsrecht*, III, 109.

It appears, therefore, that the Latin curia like the Homeric phratria was the unit of the militia organization; and in its three-fold character as a group of kindred, a local area, and a division of the host, we may perhaps find a hint as to the true nature and real origin of the Germanic hundred. Besides it is not necessary to assume that the analogy ends here. The curia may have been a much more important administrative body than our meagre information seems to show. Indeed it is possible, even probable, that it was the lower unit of taxation within the tribe, just as the hundreds of Saxon England were employed by the scirgerefa for a similar purpose.[1]

(c).—*The Iroquois Brotherhood.*

To discover the real character of the personal group answering to the hundred among the Hellenic or Italic peoples is extremely difficult, because, when history begins, their tribal organization has already been partially superseded and obscured through the rise of a political constitution resting on local divisions. It has been necessary to eke out our scanty information by inferences and conjectures. But if we look nearer home among the aborigines still dwelling in our own country, we shall be able to study the genealogical organisms in a much earlier and purer form. Mr. Morgan's researches into the social condition of the Iroquois and other Indian tribes have thrown much light on one or two questions connected with the genesis and uses of the phratry.[2] Thus, for example, we are able better to understand how a certain degree of artificiality, even of numerical symmetry, may exist without destroying or greatly weakening the bond of kinship or religion.

[1] Cf. Mommsen, *Staatsrecht*, III, 109–10. On the curia see also Fustel de Coulanges, *The Ancient City*, 156–7; Pauly, *Real-Encyclopädie*, II, 780; Morgan, *Ancient Society*, 306 ff.; Mommsen, *Römische Geschichte*, I, 35, 36, 64–7, 253; Hearn, *Aryan Household*, 333–4; Duruy, *Hist. of Rome*, I, 190, 194.

[2] *Ancient Society*, pp. 88–121.

Four of the "six nations" constituting the Iroquois confederations are organized in gentes and phratries. The Seneca and the Tuscarora tribes have each two phratries, every phratry composed symmetrically of four gentes. On the other hand, while the Cayugas and Onondagas have also each two phratries, the distribution of gentes is different; the first phratry containing five and the second phratry, three gentes.

"The eight gentes of the Seneca-Iroquois tribe were reintegrated in two phratries as follows:

First Phratry.

Gentes—1. Bear. 2. Wolf. 3. Beaver. 4. Turtle.

Second Phratry.

Gentes—5. Deer. 6. Snipe. 7. Heron. 8. Hawk.

"Each phratry (De-ă-non-dă'-a-yoh) is a brotherhood as this term also imports. The gentes in the same phratry are brother gentes to each other, and cousin gentes to those of the other phratry. They are equal in grade, character, and privileges. It is a common practice of the Senecas to call the gentes of their own phratry brother gentes, and those of the other phratry their cousin gentes, when they mention them in their relation to the phratries. Originally marriage was not allowed between the members of the same phratry; but the members of either could marry into any gens of the other. This prohibition tends to show that the gentes of each phratry were subdivisions of an original gens, and therefore the prohibition against marrying into a person's own gens had followed to its subdivisions. This restriction, however, was long since removed, except with respect to the gens of the individual. A tradition of the Senecas affirms that the Bear and Deer were the original gentes, of which the others were subdivisions. It is thus seen that the phratry had a natural foundation in the kinship of the gentes of which it was composed. After their subdivision from increase of numbers there was a natural tendency to their reunion in a higher organization for objects

common to them all. The same gentes are not constant in a phratry indefinitely, as will appear when the composition of the phratries in the remaining Iroquois tribes is considered. Transfers of particular gentes from one phratry to the other must have occurred when the equilibrium in their respective numbers was disturbed. It is important to know the simple manner in which this organization springs up, and the facility with which it is managed, as a part of the social system of ancient society. With the increase of numbers in a gens, followed by local separation of its members, segmentation occurred, and the seceding portion adopted a new gentile name. But a tradition of their former unity would remain, and become the basis of their reorganization in a phratry."[1]

The evolution of the phratric organization in the other Iroquois tribes is precisely the same in all essential features. The gentes in each bear animal names; and since many of the same names occur in every tribe, this fact goes to prove that the entire confederation was knit together by the ties of common blood. The history of the Tuscaroras, in particular, affords striking illustrations not only of the long persistence, but also of the segmentation of the gentes.[2]

The Iroquois phratry is made use of for social, religious, and political purposes, though it has no proper governmental functions. Socially it is employed in the games which occur at the tribal and confederate councils. Such, for instance is the ball game in which phratry plays against phratry. As a religious body it concerns itself with the celebration of funeral rites; and, in case of the Senecas, at least, each phratry formerly had its medicine lodge, though it would seem that the latter is usually a tribal institution.[3] Moreover each phratry

[1] Morgan, *Ancient Society*, 90-91.

[2] Morgan, *Ancient Society*, 93. The other two tribes of the Iroquois, the Mohawks and Oneidas, have each the same three gentes, but no phratries; but Mr. Morgan thinks that in each tribe an entire phratry has been lost: *Ib.*, 92.

[3] Morgan, *Ancient Society*, 97, 115.

has a council invested with a certain political authority. Upon the death of a sachem or chief of any gens, his successor is elected by members of the gens itself; but the choice is subject to the approval or rejection of the council of either phratry, even of that to which the gens concerned does not belong. In like manner the council possesses the rudiments of judicial power, having the right in the case of a murder to take measures for securing vengeance or for effecting a compromise with the relatives of the slain. But the phratry has no chief or president as had the analogous body among the Greeks, Latins, and Teutons.[1]

II.—The Hundertschaft.

(*a*).—*The Pagus or Gau.*

Everywhere among the Teutonic peoples the hundred appears as an organization midway between the mark and the völkerschaft. But the question of its origin and primitive character is one of the most difficult in the whole range of institutional history. Even the significance of the name is wrapped in obscurity. As we know it, the hundred does not answer to a hundred of anything; but, as Mr. Freeman remarks, "every name must have had a real meaning when it was first given, and there must have been a time when the hundred or century must have been a real hundred or century of something, whether of houses, or families, or fighting men."[2]

Various theories to account for the numerical designation

[1] It is remarkable that the symmetrical division of the tribe into two phratries is found also among the Choctas, Chickasas, Thlinkeets, and perhaps elsewhere. The Mohegans, however, have three phratries, evolved respectively from the three original gentes—the Wolf, the Turtle, and the Turkey, which names the phratries also bear: Morgan, *Ancient Society*, 99–101.

[2] *Comparative Politics*, 117–18.

have been advanced.[1] Thus among early writers Verelius[2] and Grimm[3] regarded the hundred as an area comprising a hundred *villae* or hamlets. Similarly Schmid, referring to the rise of the institution in England, favors the view that it was a territory containing a hundred hides.[4] Ihre makes it a district which sends a hundred warriors to the host;[5] and he is followed in this theory by Lappenberg, who, however, admits that the "appointment of a hundred men may often have stood in connection with the same number of free families, or with so many hides."[6] Eichhorn,[7] whose opinion is endorsed by Kemble[8] and Konrad Maurer,[9] holds that it was originally a personal division and that it first became territorial, at the close of the nomadic stage, through the occupation by each organized century of warriors of a district for a common dwelling place. Waitz inclines also to this view, but goes further and thinks that each of the hundred warriors was assigned a hufe or hide of land, the possession of which constituted the basis of his right to participate in the assembly and the host.[10] Finally Bishop Stubbs, referring to its English history, declares that the only reasonable conclusion is "that,

[1] The opinions of many writers are collated by Konrad Maurer, *Kritische Ueberschau*, I, 77–8. See also Waitz, *Verfassungsgesch.*, I, 160.

[2] *Index linguae veteris Scytho-Scandicae sive Gothicae*, s. v. *hundari*, cited by Maurer, *Krit. Ueb.*, I, 77.

[3] Grimm, *Rechtsalterthümer*, 533–4. He regards the Anglo-Saxon hundred as composed of ten tithings and each tithing of ten *tunas* or *villae*.

[4] Schmid, *Gesetze*, 613–14. But see *Hermes*, Bd. 32, pp. 238–9, erroneously cited by Maurer, *Krit. Ueb.*, I, 77.

[5] *Glossarium Suiogothicum*, s. v. *härad u. hundari*, cited by Maurer, *Krit. Ueb.*, I, 77.

[6] Lappenberg, *Anglo-Saxon Kings*, II, 403–4.

[7] *Deutsche Staats- und Rechtsgeschichte*, § 23, cited by Maurer, *Krit. Ueb.*, I, 77.

[8] *Saxons*, I, ch. IX.

[9] *Kritische Ueberschau*, I, 78.

[10] *Deutsche Verfassungsgeschichte*, I, 160–161. On the signification of *hufe*, *hube*, or *hoba* see *Ib.*, p. 119; Bluntschli, *Wirthschaft. Rechtsord. der deutsch. Dörfer: Krit. Ueb.*, II, 303.

under geographical hundreds, we have the variously sized pagi or districts in which the hundred warriors settled; the boundaries of these being determined by other causes, as the courses of rivers, the ranges of hills, the distribution of estates to the chieftains, and the remnants of British independence."[1]

But whatever its origin, whether the hundred was at some time the district in which a hundred warriors settled, or whether it was the division of land and people which furnished a hundred fighting men whenever the host was levied —the name was already losing its numerical significance when history dawns. Tacitus informs us that a hundred warriors proceeded from each pagus which therefore was called a hundred; but he significantly adds, "what was once a number is now an honor and a name."[2] In other words, the hundred, like the primitive curia, and possibly the phratria, was already a local district standing in some relation to a division of the host; but, as in the case of the curia or the phratria, in becoming local the ancient genealogical organisms were not entirely destroyed. The hundred must be regarded as a group of localized gentes — Markgenossenschaften — held together somewhat loosely by the tie of common blood.[3] "So far as it rested on a numerical basis," says Waitz, "it did not grow

[1] *Constitutional History*, I, 97–8. Cf. also on the origin of the name, Spelmann, *Glossarium*, p. 364; Inama-Sternegg, *Ausbildung der grossen Grundherrschaften*, 3–4; Thudichum, *Der altd. Staat*, 28–9, who regards the pagus of Tacitus as the territory which the *hundertschaft*, or hundred warriors, occupied.

[2] Definitur et numerus; centeni ex singulis pagis sunt, idque ipsum inter suos vocantur, et quod primo numerus fuit, jam nomen et honor est: *Germania*, c. 6. The interpretation of Waitz, *Deutsche Verfassungsgeschichte*, I, 161, is followed in the text; but cf. Thudichum, *Der altdeutsche Staat*, 28–9; Baumstark, *Erläuterung*, 339 ff.

[3] Sohm, *Reichs- und Gerichtsverfassung*, I, 2; Waits, *Verfassungsgeschichte*, I, 150. The army itself was composed of organized groups of kindred. "Quodque praecipuum fortitudinis incitamentum est, non casus, neque fortuita conglobatio turmam aut cuneum facit, sed familiae et propinquitates"; Tacitus, *Germania*, c. 7. Cf. Caesar, *De Bel. Gal.*, I, 51.

up so naturally and free as did the village community on the one hand, and the tribe on the other."[1] But there is no trace of the numerical symmetry which characterizes the subdivisions of the Hellenic, the Italic, or even the American tribes.[2] Indeed after the völkerwanderung, the natural organizations, larger and smaller, which had been thrown into some confusion through the exigencies of that military age, readjusted themselves and for a time remained the determinative elements of the social constitution, leaving to the hundred as such a narrow range of administrative functions.[3]

It is of supreme importance for a right understanding of the real character of the primitive hundred to note closely its constitutional limitations. Until recently it was the prevailing opinion that the hundred, like the mark and völkerschaft, was employed for political, religious, and economic, as well as for judicial purposes.[4] Indeed it is not impossible that even in the early period a portion of the conquered lands may have been assigned to the hundertschaft as a common mark.[5] Be

[1] Waitz, *Verfassungsgeschichte*, I, 165.

[2] The number of marks in the hundred and of hundreds in the völkerschaft was variable.

[3] Cf. Inama-Sternegg, *Die Ausbildung der grossen Grundherrschaften*, 4.

[4] This opinion is thus expressed by Waitz, referring to the respective assemblies of the mark, hundred, and völkerschaft: "Dass ein Unterschied zwischen der Einrichtung und den Geschäften dieser Versammlungen war, liegt in der Natur der Sache. Doch eine scharfe Scheidung hat kaum stattgefunden: der allgemeine Charakter war wenigstens derselbe: die kleineren Versammlungen erscheinen wie ein Abbild derer die sich auf die Gesammtheit der staatlichen Verbindung bezogen. Diese aber haben ihren Charakter erst im Lauf der Zeit verändert:" *Deutsche Verfassungsgeschichte*, I, 316. Cf. *Ib.*, 129–30; *Das Alte Recht*, 143; Grimm, *Rechtsalterthümer*, 745.

[5] Inama-Sternegg, *Ausbildung der grossen Grundherrschaften*, 4; Waitz, *Verfassungsgeschichte*, I, 164; Thudichum, *Gau- und Markverf.*, 127–133. Maurer, *Einleitung*, 46 ff., 59–62; Kemble, *Saxons*, I, 56. Cf., however, Grimm, *Rechtsalterthümer*, 494–503, and Bluntschli, *Die wirthschaftliche Rechtsordnung der deutschen Dörfer: Krit. Ueb.*, II, 299–300, who seem to regard the village communities as the normal possessors of the common lands.

this as it may, the investigations of Sohm have established, with a high degree of probability for the age of Tacitus and positively for the Frankish period, that the hundred was neither a political nor a religious unit.[1] It was essentially an administrative district or circumscription employed by the state chiefly for judicial purposes. As such it was called a *gau* by the Germans and a *pagus*[2] by Tacitus; and the Historian, it should be observed, employs the word advisedly, for pagus is the ordinary Latin designation for a subordinate district,[3] and it is never used for the territory of the state as a whole.[4]

[1] Sohm, *Reichs- und Gerichtsverf.*, I, 5–8, 57 ff.

[2] *Germania*, c. 6, 12. Caesar also uses *pagus* for an under division of the *civitas*: *De Bell. Gal.*, I, 12, 37; IV, 1.

[3] Arnold, *Roman Provincial Administration*, 208; Lange, *Romische Alterthümer*, I, 64, 83 ff., 570.

[4] The principal authorities now agree that for the period under consideration *gau* can properly be employed only for the hundred; and there is no doubt as to the identity of the hundred and the *pagus* of Tacitus. See Konrad Maurer, *Krit. Ueb.*, I, 82–4; Roth, *Beneficialwesen*, 2; Stubbs, *Const. Hist.*, I, 98, 109–13; Waitz, *Verfassungsgeschichte*, I, 142–4, 158; Thudichum, *Der altdeutsche Staat*, 28; *Gau- und Markverfassung*, 1–10.

But the word *gau* seems to be related etymologically to the Greek *gê*, and has the general signification of *land* or *district*. Hence it was employed for almost any territorial area, subordinate to that of the state. Cf. Sohm, *Reichs- und Gerichtsverf.*, I, 12, 201 ff.; Thudichum, *Gau- und Markverf.*, 1–10; Inama-Sternegg, *Deutsche Wirthschaftsgesch.*, 35 f.; Maurer, *Einleitung*, 55–7; Waitz, *Verfassungsgesch.*, I, 144; II, 322 ff. Accordingly, during the Merovingian and Karolingian periods gau was used not only for the hundred, as before, but also for the old civitas or völkerschaft; *because* the latter had now become a mere administrative district of the united kingdom. It is of the utmost importance that the correct use of the terminology should be noted, for misapprehension and lack of precision in this regard have led to much confusion in tracing the different phases of evolution. Thus the account of Kemble (Saxons, I, chap. III) is utterly bewildering. He uses gau or *gá* for shire, which is right enough, if employed merely as a descriptive term: for the shire is a mediatized state or völkerschaft. But he goes further (pp. 72, 86–7) and makes it the original designation of the tribal state itself. Moreover, ignoring the hundred altogether, he represents the marks as uniting directly to form the shire or gau (pp. 72, 85) with which

The court of the hundred was, so to speak, the common law tribunal among the Teutonic tribes. According to Tacitus it was presided over by the princeps chosen in the great assembly of the civitas; but he was aided by a hundred companions from among the people, who were present for authority and advice.[1] In other words, according to the best interpretation of the passage, the princeps presided but the judges were the freemen of the hundred in folkmoot assembled.[2] The jurisdiction of the court probably extended to the declaration of folk-right in all cases, civil and criminal. There was no appeal in the proper sense of the word; but graver crimes were reserved for the council of the civitas,[3] which, as the bearer of national sovereignty, may also have exercised supreme jurisdiction in case of failure to secure justice in the lower tribunals.

(*b*).—*The Centena or Untergau.*

Passing over the long interval between the age of Tacitus and the advent of the folk laws, during which time there is almost a complete blank in the history of Teutonic institutions, it is now proposed to trace briefly the development of the hundred constitution among the Franks. And here we

he uses *pagus* (p. 76) as an interchangeable term. Mr. Freeman also is at variance with the present usage. Referring to the Teutonic organization in the age of Tacitus, he says: "Above the hundred comes the *pagus*, the *gau*, the Danish *syssel*, the English shire, that is, the tribe looked at as occupying a certain territory": *Comparative Politics*, 118. Again he remarks—"in the days with which we have now to deal, the tribe was the state, the *gau* was the territory of the state": *Ib.*, 119, 413. See also Grimm, *Rechtsalterthümer*, 496; Palgrave, *Commonwealth*, I, 116; Schulte, *Reichs- und Rechtsgeschichte*, 25–26.

[1] "Eliguntur in iisdem conciliis et principes, qui jura per pagos vicosque reddunt. Centeni singulis ex plebe comites consilium simul et auctoritas adsunt": Tacitus, *Germania*, c. 12.

[2] See Waitz, *Verfassungsgesch.*, I, 154–5, and the authorities there cited.

[3] Tacitus, *Germania*, c. 12.

shall be able to see more clearly some things which appear but dimly in the brief notices of the Germania.

The history of the Frankish hundred divides itself into two district phases: that of the *Lex Salica*, a compilation of early custom originating not later than the close of the fifth century;[1] and that of the Merovingian and Karlovingian supremacies extending from the sixth to about the tenth century. During the first epoch the hundred appears as an area subordinate to the larger administrative district of the grafio or count; and this higher division is nothing less than the once sovereign völkerschaft now degraded to the rank of a mere member of a larger whole—the stamm kingdom.[2]

In the *Lex Salica* the hundred is not directly mentioned, unless indeed the term pagus, which there seems to be employed for the district of the grafio, is also used as a designation of the hundred.[3] But the existence of the institution and its general character are plainly revealed. It appears exclusively as a judicial organization. At its head stands the centenarius or thunginus,[4] who is chosen, not in the national assembly as was the princeps of the Germania, but by the freemen of the hundred itself.[5]

The court of the hundred is called *mallus*,[6] literally the "speech"; and it meets periodically on the maloberg, a hill,

[1] Waitz, *Das alte Recht*, 83; *Verfassungsgesch.*, II, 30; Schroeder, *Die Franken und ihr Recht*, 37.

[2] See Chap. VI, III.

[3] See Behrend, *Lex Salica*, 1. 5, 41. 6, 50. 3, 55. 2 (3), where *pagus* occurs. Cf. Waitz, *Das alte Recht*, 134.

[4] *Thunginus aut centenarius* he is styled in the law: Behrend, *Lex Salica*, c. 44. 1, 46. 1.

[5] Sohm, *Reichs- und Gerichtsverf.*, 73; Waitz, *Das alte Recht*, 137. Maurer, *Einleitung*, 139; *Dorfverf.*, II, 29; and Grimm, *Rechtsalt.*, 534, regard the thunginus as the head officer of a village—dorfvorsteher; but this is refuted by Sohm, p. 71, and Waitz, pp. 135, 150.

[6] Grimm, *Rechtsalt.*, 746; Waitz, *Das alte Recht*, 289; Sohm, *Reichs- und Gerichtsverf.*, I, 57-62.

grove, or other place dedicated especially to this purpose.[1] In the mallus the centenarius presides, but the whole body of freemen are the judges; and in their judicial capacity they are styled *rachineburgii*, a name which expresses the nature of their functions.[2] But the decisions are not made by the whole body of freemen who may at any time chance to be present in the court. From their midst seven assessors are selected for each session, or perhaps for each particular case, by the presiding magistrate or by the interested parties; and these assessors, sitting upon benches, render judgment in the name of their fellows who remain standing. The select body of seven constitute the rachineburgii in the restricted sense; but they are merely the temporary representatives of the whole people who are responsible for the decisions and openly proclaim their assent.[3] And so the hundred court appears as a tribunal whose authority flows from the majesty of the people and not from that of the king.[4]

[1] Waitz, *Das alte Recht*, 143; Sohm, *Reichs- und Gerichtsverf.*, 273–8; Grimm *Rechtsalt*, 801; Thudichum, *Gau- und Markverf*, 53.

[2] Savigny, *Hist. of the Roman Law*, I, 205 ff., derives the word from *rek* = great, and *burg* = surety; and makes the office identical with that of the Lombard *arimanni* and (following J. Müller) the Spanish *ricos hombres:* cf. *Ib.*, 184 ff., 198. Grimm, *Rechtsalt.*, 293 f., 774, regards the word as composed of the Old High Germ. *rakin* = consilium, and *burgius* = fidejussor = A. S. *freoborg*, freepledge, thus conveying the idea of a freeman in the capacity of judge. Cf. Müllenhoff's glossary, Waitz, *Das alte Recht*, 291, who makes the word = A. S. *raedbora*, one who gives counsel; see also Schade, *Altd. Wörterb.*, II, 698.

[3] Behrend, *Lex Salica*, c. 50. 3, 56., 57. *Seven* rachineburgii are mentioned in the *Lex;* but Waitz conjectures that originally the normal number may have been twelve, seven sufficing for a legal session. On the whole subject see Waitz, *Verfassungsgesch.*, II, 36, 484 ff.; I, 480 ff., and his earlier view in *Das alte Recht*, 153; Rogge, *Das Gerichtswesen*, 66–7; Stubbs, *Const. Hist.*, I, 54–5; Schulte, *Reichs- und Rechtsgesch.*, 382–3; Warnkoenig, *Franz. Staats- und Rechtsgesch.*, I, 151; Savigny, *Hist. of the Roman Law*, I, 198 ff.

[4] "Die ganze Gerichtsverfassung der Lex Salica ergiebt sich aus dem einem Satz: Die Gerichtshoheit ist Volkshoheit, nicht Königshoheit": Sohm, *Reichs- und Gerichtsverf.*, I, 101. See, however, Fustel de Coulanges, *Inst. Pol.*, 510, note 2, who denies that the mallus was a popular assembly.

But the king is represented in the mallus by his own officer, the sacebaro, who is present there to look after his fiscal interests.[1] Moreover the grafio or ruler of the pagus of which the hundred forms a part may attend the court as the general executor of its decrees; but neither grafio nor sacebaro possesses any deciding power. The grafio like the sacebaro is the king's nominee, and they occupy analogous positions in their respective districts. But the grafio discharges the various functions of a general administrator of the law, while the sacebaro is essentially a fiscal agent.[2]

Besides the ordinary litigation, the mallus is employed for certain transactions of a quasi judicial character where great publicity is required. Thus in a meeting specially called for the purpose, occurs the symbolical alienation of the family property, *adfathamire*, which among the Germans takes the place of the testament or adoption in the appointment of an heir;[3] and here also takes place the ceremony of paying the *reipus* to the relatives of a widow as the penalty for her entering upon a second marriage.[4] But in the case of the adfathamire,

[1] The chapter of the Lex Salica relating to the sacebaro throws little light on the character of the office: Behrend, Lex Salica, c. 54. Cf. Sohm, *Reichs- und Gerichtsverf.*, 74 ff.; Waitz, *Das alte Recht*, 140 ff.; *Verfassungsgesch.*, II, 39 ff. According to the passage of the Salic Law cited, only three sacebaronen were to be present in the court; hence, it is concluded that more than one was usually appointed for each hundred. The word seems to mean 'law man,' *vir litis, causae forensis:* Müllenhoff's glossary, in Waitz, *Das alte Recht*, 292. Cf. Grimm, *Rechtsalt.*, 783–4.

[2] Sohm, *Reichs- und Gerichtsverf.*, 93–99.

[3] Behrend, *Lex Salica*, c. 46. The procedure is described by Waitz, *Das alte Recht*, 147–9. It bears a resemblance to the Roman mancipatory will, in the later period when a third person as familiae emptor received the property in trust for the heir. Cf. Schroeder, *Geschichte des ehelichen Güterrechts*, I, 158; Warnkoenig, *Franz. Staats- und Rechtsgesch.*, II, 443 ff. On the derivation of the word *adfathamire*, see Müllenhoff's glossary, Waitz, *Das alte Recht*, 277.

[4] Behrend, *Lex Salica*, c. 44. Cf. Waitz, *Das alte Recht*, 146–7. The reipus, that is the 'bandgeld' or 'ringgeld' was the symbolical penalty paid by the bridegroom to the relatives of a widow before the marriage: Sohm,

and possibly also in that of the reipus, only the preliminary procedure occurs in the special meeting, and hence the transaction must subsequently be carried to completion in a regular mallus; but the centenarius presides in the special just as he does in the regular assembly.[1] It is in the ordinary court, finally, that the ceremony of renouncing the ties of kinship takes place. He who will separate himself from his family must appear there before the thunginus and break three alder branches over his head, and throwing the fragments toward the four points of the compass, declare that he thus separates himself from the oath, the inheritance, and all legal relations of his kindred.[2]

We now turn to the second phase of development during which the ancient popular organization gradually falls into decay, chiefly through the encroachment of the central authority.

The zent, centena, or vicaria[3] of the Frankish empire occupies the same relative position as a judicial subdivision of the state as did the hundred of the Salic law. Although a union of races under the dominion of one monarch has superseded the stamm as the highest conception of the state, yet the graf-

Das Recht der Eheschliessung, 63-4; Laboulaye, *Condition des Femmes*, 159 ff.; Warnkoenig, *Franz. Staats- und Rechtsgesch.*, II, 239 f.; Müllenhoff's glossary, Waitz, *Das alte Recht*, 292. Cf. Grimm. *Rechtsalt.*, 425–7.

[1] Waitz, *Das alte Recht*, 146, 148.

[2] "In mallo ante thunginum ambulare debet et ibi tres fustis alninus super caput suum frangere debet. Et illos per quattuor partes in mallo jactare debet et ibi dicere debet, quod juramento et de hereditatem et totam rationem illorum se tollat": Behrend, *Lex Salica*, c. 60. 1. Cf. also Waitz, *Das alte Recht*, 149.

[3] Sohm, *Reichs- und Gerichtsverf.*, I, 213 ff., has proved that *vicaria* and *vicarius* are identical with *centena* and *centenarius*. *Zent* is probably a pure German word, and *centena* and *centenarius* are German words Latinized: Thudichum, 19 f.; Sohm, 219. Various forms of the word hundred also occur in different dialects: huntari, hundschaft, hondschaft, hunschaft, hunnaria; but it is not certain that these are all used for the hundred division: Thudichum, 21 f. Cf. Grimm, *Rechtsalt.*, 532–3, 755–6; Waitz, *Verfassungsgesch.*, II, 318 ff.

schaft or mediatized völkerschaft is still retained as the larger administrative district. The term pagus, with its German equivalent gau, is used indifferently for both grafschaft and centena; and so the latter is styled the 'undergau' as distinguished from the 'gau' or 'great gau' over which the count presides.[1]

But in the process of centralization very important and very interesting changes have taken place in the hundred constitution. The mallus, during the Merovingian era, is still composed of the freemen or rachineburgs who pronounce judgment;[2] but the graf has superseded the centenarius as its presiding officer. The centenarius or vicar is no longer the headman of the hundred chosen by the popular voice: he is now a mere royal bailiff or schultheiss appointed by the graf acting as the king's agent. He is not a judge, but a servant of the judge.[3] In short the centenarius is degraded to the position of the Salic sacebaro whom he has displaced; though the sacebaro unlike the centenarius, was nominated directly by the king.[4]

Finally from the last part of the eighth century, the mallus begins to lose its popular character. Only in the two or three general yearly assemblies, attendance upon which is enjoined

[1] On the use of gau and untergau, see Thudichum, *Gau- und Markverf.*, 9 ff.; Sohm, *Reichs- und Gerichtsverf.*, I, 201 ff., 74–9; Waitz, *Verfassungsgesch*, II, 323 ff.

[2] Waitz, *Verfassungsgesch.*, II, 484 ff.

[3] Sohm, *Reichs- und Gerichtsverf.*, 257. Waitz, *Verfassungsgesch.*, II, 356 ff., however, claims that in the Merovingian period the hunno or centenarius was still an elective officer, though he had in most places lost his position as president of the mallus.

[4] See the whole subject worked out from the sources in Sohm, *Reichs- und Gerichtsverf.*, I, 146–272. He holds that the later centenarius performed the duties of a *schultheiss*, that is of a judicial executor in criminal cases; and that the office is identical, not only with that of the vicarius, but also with that of the tribunus. See, however, Waitz, *Verfassungsgesch.*, II, 347 ff.; III, 332 ff.; IV, 317 ff.; Maurer, *Einleitung*, 140; *Städteverf.*, I, 547, whose conclusions differ radically in many particulars from those of Sohm.

by imperial authority,[1] do all the freemen appear. At the ordinary judicial sessions few besides the interested parties are usually present; and the meetings take place, not as of old in the open air on the maloberg, but within the walls of a building, a court house, erected there for the purpose. Moreover, throughout the greater part of the empire, the freemen cease to act as judges. The rachineburgii, hitherto selected from the body of suitors as occasion required, are now superseded by the *scabini*, a kind of professional jurors or assessors, appointed for the entire grafschaft by the count or the imperial missus with the assent of the people, and holding office for life. From the whole body of scabini, whose number is unknown, certain members, usually seven as in the case of the rachineburgii, are selected to sit with the count in each hundred court of his gau; and they are sworn to render no unjust decision. But in Saxony and some other German lands, the "good men" or "neighbors" still continue to pass judgment in the ancient manner.[2]

[1] The capitulary of 769 requires everyone to attend the mallus twice each year—in autumn and spring: *Capit.*, c. 12, Walter, *Corp. Jur. Germ.*, II, 55. Later, attendance on three meetings was required: Waitz, *Verfassungsgesch.*, IV, 308, note 2.

[2] *Scabinus* seems to mean "one who judges or ordains," from *scafan*, schaffen, equalling *ordinare, decernere:* Grimm, *Rechtsalt.*, 775, 768; Waitz, *Verfassungsgesch.*, IV, 326, note 3. By the capitulary of 803 the appointment of scabini was given to the missi: *Capit.*, c. 3, Walter, *Corp. Jur. Germ.*, II, 181. The capitulary of 809 requires them to be nominated by the count and people: Walter, II, 234. But later it was enacted—"ut missi nostri ubicunque malos scabineos inveniunt, eiciant, et totius populi concensu in loco eorum bonos eligant. Et cum electi fuerint, iurare faciant ut scienter iniustè iudicare non debeant:" *Capit.* 829, c. 2, Walter, II, 382. How many were nominated for each graftschaft is uncertain; and while seven seem usually to have been selected for a particular session, in practice the number greatly varied. On the whole subject see Waitz, *Verfassungsgesch.*, IV, 325 ff.; Warnkoenig, *Franz. Staats- und Rechtsgesch.*, I, 150 ff.; Rogge, *Das Gerichtswesen*, 74–5; Schulte, *Reichs- und Rechtsgesch.*, 382–3. Savigny, *Hist. of Roman Law*, I, 217 ff., holds that the scabini only lightened the duties of the *boni homines* or freemen who might still act with the former as judges; and this is true for some places. Cf. Waitz, IV, 339.

III.—The Old English Hundred.

(*a*).—*The Primitive Constitution.*

Almost no trustworthy information exists as to the origin of the hundred in Britain. It is remarkable that here as elsewhere its primitive history must be pieced together from a few obscure references in the early codes which take for granted a knowledge of the institution and make no attempt at systematic explanation. The hundred is first mentioned in the laws of Eadgar,[1] where it appears as a geographical area[2] employed as the unit of the judicial and peace administration; and shortly thereafter we learn that it is a subordinate division of the shire. But it is probable that the institution, if not the name, existed from the earliest Teutonic settlement in England.[3] On the authority of William of Malmsbury its creation is popularly ascribed to Aelfred;[4] and while this cannot be literally true in the sense intended, there is reason to believe that about the beginning of the ninth century there may have occurred something like a rearrangement of the administrative divisions of the kingdom. For in England, just as among the Franks, the empire arose through the process of uniting or mediatizing tribal states and larger kingdoms which had

[1] Eadgar (A. D. 959–975), *Constitutio de Hundredis*: Schmid, *Gesetze*, 182 ff.; Thorpe, *Anc. Laws*, I. 258 ff.

[2] That it was territorial is proved by Eadgar, I, 5, where it is stated that the track of cattle may be pursued from one hundred into another: Thorpe, *Anc. Laws*, I, 261. Cf. Creasy, *Hist. of Eng.*, I, 169.

[3] But among the Saxons of the Continent, as also among the Frisians, the name hundred does not appear; still it is not improbable that the institution and even the name may have existed, though no record of the fact is preserved. The numerical designation may have been entirely supplanted by gau: K. Maurer, *Krit. Ueb.*, I, 75–79. Stubbs, *Const. Hist.*, I, 56, regards the absence of the hundred among the Saxons as "presumptive evidence of superior simplicity of organization." Cf. Waitz, *Verfassungsgesch.*, I, 153.

[4] The passage from William is quoted by Stubbs, *Const. Hist.*, I, 99, note 1. Cf. K. Maurer, *Krit. Ueb.*, I, 85; Schmid, *Gesetze*, 613.

themselves been similarly composed. So that it is not improbable, that when the last of the so-called heptarchic kingdoms had been brought under the West Saxon supremacy, the primitive völkerschaften and their subdivisions were uniformly chosen, so far as practicable, as the administrative districts of the united monarchy. In other words, while the völkerschaft became a shire or gau and the original gau or hundred became an undergau, the heptarchic stamm kingdoms were ignored.[1]

It is in the laws of Eadgar also that mention is first made of the *wapentake*, an organization found only in connection with the Anglian shires.[2] Moreover the name is of Scandinavian origin, and seems to have reference to the touching of the arms of the local magistrate in recognition of his authority.[3] It is therefore probable that the institution was introduced into England by the Danes; and scholars have hitherto regarded it as merely an equivalent for the hundred of the southern shires. But the recent investigations of Canon Taylor have raised serious doubts as to the correctness of this view. He shows that the evidence of Domesday goes to prove, if indeed it does not completely demonstrate, that the wapentake was an administrative district comprising just three hundreds. Thus he is able to name the three hundreds of each of the six wapentakes of the east riding of Yorkshire; and while this can not

[1] Cf. Henry Adams, *the Anglo-Saxon Courts of Law, Essays*, 5 ff.; and Chap. VI, III, (*a*), below.

The question of the numerical significance of the term hundred has already been discussed; but, on the theory that each of the English hundreds comprised a hundred hides, see further, Pearson, *Hist. Maps*, 28 f., 57; Ellis, *Int. to Domesday*, 184; Schmid, *Gesetze*, 614; *Dialog. de Scac.*, c. 17: *Select Charters*, 209; Stubbs, *Const. Hist.*, I, 99; Taylor, *Wapentakes and Hundreds, Domesday Studies*, I, 70, 76.

[2] Eadgar, IV, 6: Schmid, *Gesetze*, 196, 672. Wapentakes formerly existed in the shires of York, Leicester, Rutland, Derby, Northampton, Buckingham, Lincoln, and Nottingham; and they are still found in York and Lincoln: Stubbs, *Const. Hist.*, I, 96; Taylor, *Wapentakes and Hundreds, Studies*, I, 68, 76.

[3] See the celebrated passage of the *Leges Ed. Conf.*, 30: Schmid, *Gesetze*, 507–8, where the ceremony of touching the lance of him who has accepted the *praefecturam wapentagii* is described. Cf. Skeat, *Etymolog. Dict.*, 695.

be done in all cases, the ratio of the aggregate number of wapentakes to that of the hundreds, or the triple area of those modern hundreds which answer to Domesday wapentakes, in some shires, renders it extremely probable that an arrangement of the hundreds by threes in the wapentake constituted the rule.[1] The Canon goes further and ventures to point out the original object of the new organization. "The wapentake seems to have been the unit on which the *navipletio* or ship-money was levied. We learn from the Saxon Chronicle that in 1008 Ethelred ordered that a ship should be furnished by every three hundred hides, and Edgar's charter to the Bishop of Worcester directed that every three hundreds should furnish one scypfylled or navipletio, from which Bishop Stubbs infers 'that every three hundreds were liable to be called on to furnish one ship.' Hence the wapentake, containing three old hundreds, each of a hundred hides, was the unit of assessment for the naval defence, just as the old hundreds had been the units for the military defence of the kingdom."[2]

Therefore, for a time in the Danish shires, hundreds and wapentakes co-existed for distinct functions. "The hundred moots may have continued to meet for civil purposes, though they were superseded for purposes of military defence by the wapentakes. Thus the hundreds became subordinate to the wapentakes, which gradually replaced them for all purposes."[3]

The head officer of the hundred is the hundred ealdor[4] or

[1] Thus according to Domesday, Lincoln had twenty-eight wapentakes and eighty-four hundreds—a ratio of one to three; and the average number of square miles in each of the six modern hundreds of Leicester is 136—fully three times as large as in the average hundred of other shires: Taylor, *Wapentakes and Hundreds*, *Studies*, I, 73–5.

[2] Taylor, *Wapentakes and Hundreds*, *Studies*, I, 76; Stubbs, *Const. Hist.*, I, 105, 99.

[3] Taylor, *Wapentakes and Hundreds*, *Studies*, I, 71. However in Derby, Nottingham, Rutland, and Leicester the Domesday wapentakes are now called hundreds, though in area they are really wapentakes.

[4] Eadgar, IV, 8, 10: Schmid, *Gesetze*, 196.

hundredman,[1] but whether he is elected by the freemen or nominated by the king is uncertain.[2]

As on the Continent, the hundred is employed chiefly for judicial purposes. Its assembly, the hundredgemot, is a representative body composed of the parish priest, the reeve and four best men from each township, together with all lords of land or their stewards.[3] The hundredgemot is in a peculiar sense the ordinary court of the freemen. Here all suits must first be heard before they may be carried to the shiremoot or before the king.[4] The court meets monthly, and exercises jurisdiction in all suits civil and criminal, voluntary and contentious. Like the mallus, it also witnesses the transfer of lands.[5] In theory all the suitors are judges. But, as in the case of the Frankish rachineburgii, the decisions are not usually rendered by the whole body. For this purpose they are represented by the "twelve senior thegns," who remind us of the seven who sat as representatives of the rachineburgii in the mallus. However the mode of appointment and the term of service are entirely unknown. Bishop Stubbs conjectures that in some cases they may have been "like the scabini or shöffen, a fixed body holding their appointment for life; or like the lawmen of Lincoln, the hereditary owners of sac and soc in the territory; or chosen merely for the occasion."[6] And he thinks further that they may be identical with the twelve thegns of the wapentake who by the laws of Aethelred are directed to join themselves with the reeve, and "swear on the halidome which shall be put in their hands, that they will

[1] Eadgar, I, 2, 4, 5: Schmid, *Gesetze*, 182, 184.

[2] Stubbs, *Const. Hist.*, I, 102. There was also a gerefa in the wapentake: Aethel., III, 3: Schmid, *Gesetze*, 212.

[3] *Hen. I*, vii, 4, 7; li, 2: Schmid, *Gesetze*, 440, 457; Stubbs, *Const. Hist.*, I, 102–3.

[4] Aethelst., II, 3; Eadgar, III, 2; Canute, II, 17, 19: Schmid, *Gesetze*, 132, 189, 281. Cf. Stubbs, *Const. Hist.*, I, 104.

[5] Stubbs, *Const. Hist.*, I, 104; Eadgar, I, 7: Schmid, *Gesetze*, 184; Waitz, *Verfassungsgesch.*, IV, 333.

[6] *Const. Hist.*, I, 103.

accuse no innocent man, nor conceal any guilty one;"[1] also with the twelve witnesses of the laws of Eadgar "before whom all bargains and sales are to be transacted."[2] Moreover he suggests that they are the prototype of the twelve legal men of the hundred "who are directed in the Assize of Clarendom to act as part of the grand jury before the judges in Eyre, and who play so important a part in the legal reforms of Henry II and his ministers."[3]

Without doubt the primitive hundredgemot, like the mallus, was held in the open air, on a hillock, at a ford, under the spreading branches of an oak, or on some other convenient spot chosen especially for the purpose;[4] and it is not improbable that it was presided over by the hundredman nominated by the voice of the freemen. But during historic times it is doubtful whether the hundredman was president of the court. The ancient democratic constitution was already falling into decay. The hundreds were themselves passing into the hands of the great lords, thus becoming the foundation of the later liberties or manors; and it is possible that the lord or his steward may have acted as chairman of the gemot.[5]

But the hundred was not exclusively a judicial organization. When taxation began under Aethelred, the hundreds, in groups of three, were made the area for levying the ship-money; and this area, as we have seen, was probably called a wapentake in the Danish shires. Long before this time the sheriff may have accounted to the crown for the profits of the hundred, whatever they might be.[6] Besides it is worthy of

[1] Stubbs, *Const. Hist.*, I, 103. Cf. Aethelred, III, 3: Schmid, *Gesetze*, 212; Thorpe, *Anc. Laws*, I, 294.

[2] Eadgar, IV, 3–6: Schmid, *Gesetze*, 196; Thorpe, *Anc. Laws*, I, 274.

[3] Stubbs, *Const. Hist.*, I, 103. The text of the Assize is contained in his *Select Charters*, 143.

[4] On the open-air meetings of the hundred and their late survival, see Gomme, *Primitive Folk-Moots*, 104–12, 214–23; Taylor, *Words and Places*, 197.

[5] Cf. Stubbs, *Const. Hist.*, 101–2, 106.

[6] Stubbs, *Const. Hist.*, I, 105.

note, that after the Conquest it continued to be employed as a fiscal unit.[1]

The hundred was also used as the unit of the police administration. The hundredman was the direct predecessor of the Norman high constable; and to him in connection with the town constable or tithingman the maintenance of the peace was particularly entrusted.[2] The celebrated *constitutio de hundredis* of Eadgar is largely concerned with the pursuit and punishment of thieves. In case of need, the hundredman is to be informed of the theft, he shall make it known to the tithingmen and all shall go forth where God directs to do justice upon the transgressor.[3]

(*b*).—*Dissolution of the Organism.*

After the Norman Conquest the hundred, like other local bodies, seems to have fallen into decay; but it was restored by Henry I, "as in the time of Edward the Confessor."[4] The presiding officer henceforth is usually the bailiff, appointed by

[1] This is seen in several ways. 1. Amercements were sometimes made by hundreds even when the latter were parts of a barony: Palgrave, *Commonwealth*, II, 351; Stubbs, *Const. Hist.*, I, 102, note 2; and see examples in Madox, *Hist. of Ex.*, 374, 393, etc. 2. The boroughs were let at fee-farm, and the larger boroughs were really hundreds or groups of hundreds. 3. It is probable that the sheriff got in the ferm of the shire, at least in part, by hundreds.

[2] Kemble, *Saxons*, I, 255 ff.

[3] Thorpe, *Anc. Laws*, I, 259; *Select Charters*, 68. On the old English hundred, see further, Palgrave, *Commonwealth*, I, Chap. III; Phillips, *Ang. Sax. Rechtsgesch.*, 82, 170; Hallam, *Middle Ages*, II, 265 ff.; Gneist, *Self-government*, II, 17 ff.; *Const. History*, I, 6, 47–50; Creasy, *Hist. of England*, I, 168–9, 179, 329; Barnes, *Origin of Hundred and Tithing: Journal of Brit. Arch. Association*, 1872; Freeman, *Norman Conquest*, I, 66; Taswell-Langmead, *Const. Hist.*, 16–17, 37.

For an excellent discussion of the question of the constitutional position of the hundred as compared with that of the town, see Prof. Allen's *Town, Township and Tithing.*

[4] Stubbs, *Select Charters*, 103–4.

the king or the lord of the franchise: for the hundred rapidly passes into the hands of the territorial magnates.[1] But the primitive ealdorman still survives, as late at least, as the reign of Edward I; and it is remarkable that he now appears as the elected representative of his district in the shiremoot.[2] However the most important officer of the mediaeval hundred is the constable, who is first mentioned by that name in the statute of Winchester, 1285; and who, from the early years of Edward III, is usually styled the "high constable" as distinguished from the "petty constable" of the township. He is the peace magistrate of the district chosen by the freemen,[3] and may therefore be regarded as the successor of the elected ealdorman, surviving side by side with the appointed bailiff; just as, in a much earlier period, the sacebaro of the Frankish king sat with the elected centenarius in the mallus, though the English bailiff, unlike the sacebaro, is president of the moot.[4]

From the time of Henry I, the hundred possesses two courts: the lesser or monthly court, in which the bailiff presides and the suitors themselves are judges; and the great court of the hundred, known eventually as the sheriff's tourn and leet.[5] The business of the lesser or popular body consists almost wholly of the collection of small debts.[6] On the other hand the tourn is an itinerant branch of the county court, held twice a year by the sheriff in each hundred of the shire. It possesses

[1] Stubbs, *Const. Hist.*, I, 400. The hundred rolls show, that after the hundreds passed into private hands, the bailiffs often exercised jurisdiction, chiefly as a means of extortion: Stephen, *Hist. of Criminal Law*, I, 130–2.

[2] The elective ealdorman existed in Essex and probably elsewhere: Palgrave, *Commonwealth*, I, 635; II, 351. Cf. *Leges Hen. I*, c. VIII, 1: Schmid, *Gesetze*, 440; also extracts from hundred rolls in Stubbs, *Const. Hist.*, I, 102, note 2.

[3] Later the high constable was usually appointed by the quarter sessions. There were often two for each hundred: Gneist, *Selfgovernment* (1871), 441.

[4] On the high constable see Lambard, *Duties of Constables*, 5 ff.; Gneist, *Selfgovernment*, II, 50; edition of 1871, 441 ff.

[5] *Leges Hen. I*, c. VII, 4; VIII, 1: Schmid, *Gesetze*, 440–1.

[6] Stubbs, *Const. Hist.*, I, 398 ff.

an important criminal jurisdiction, and is especially entrusted with the view of frankpledge and the general maintenance of the peace.[1]

For sometime, therefore, subsequent to the reign of Henry I, the hundred courts retained their ancient character as folk-moots; but, after the beginning of the thirteenth century, they fell rapidly into decay. The sheriff lost his criminal jurisdiction in the tourn, and the oversight of the peace administration passed into the hands of the justices. Suitors refused to attend the sessions; and various classes of persons were excused from attendance by statute.[2] Several efforts were made to reinvigorate the decaying organization, for example, under Henry III and Edward III;[3] and, even as late as Edward VI, it was enacted that the 'county courts'—as the hundred courts are here called—should be held monthly and not every six weeks, as it seems had been the practice.[4]

But every attempt to stay the dissolution of the hundred failed; and the institution has now but a nominal existence. Until 1844 the high constable continued to collect the county rate; but in 1869 the office was permissively abolished;[5] and so the only surviving importance of the hundred is its liability, under the act of 1827 and various subsequent statutes, "to make compensation for damage done by rioters within its limits." And even this requirement is practically a dead letter.[6]

[1] Gneist, *Selfgov.*, II, 28 ff.; Stephen, *Hist. of Crim. Law*, I, 65.

[2] The statute of Merton, 1236, allowed freemen to appear by attorney in local courts; and by the Statute of Marlborough, 1267, all above the rank of knights were excused from attendance on the tourn: Stubbs, *Const. Hist.*, II, 205–6.

[3] See extracts from the statutes in Toulmin Smith, *Local Government*, 219–20. Stubbs, *Const. Hist.*, II, 382.

[4] Toulmin Smith, *Local Govt.*, 221.

[5] The quarter sessions may discontinue the office of high constable in any hundred of the county when they think proper: P. V. Smith, *Hist. of Eng. Inst.*, 107; Chalmers, *Local Govt.*, 40; Gneist, *Selfgov.* (1871), 442 ff.

[6] Chalmers, *Local Govt.*, 18; Gneist, *Selfgov.* (1871), 346, note. See the table of hundreds as arranged in shires, 1851: *Ib.*, 82–3.

IV.—Rise and Decay of the Hundred in the American Colonies.

(*a*).—*The Name Hundred in Maine and Virginia.*

When English colonization of America began in the seventeenth century, the hundred constitution was already far advanced in process of dissolution. In New England the town struck vigorous root; and this form of local government, in co-operation with the shire for certain purposes, seemed adequate to the political requirements of the new settlements. The history of the hundred in the northern colonies is little more than the history of a name. The Council for New England, as we have seen,[1] contemplated the division of their domain into baronies, counties, hundreds, and manors; but the scheme was never carried out. Sir Ferdinando Gorges seems to tell us that he actually divided his jurisdiction in Maine into eight counties or bailiwicks, and these again into "sixteen several hundreds." These hundreds stood in a definite relation to the parishes and tithings which were instituted "as the population did increase and the provinces were inhabited." Thus each hundred was to have two head constables assigned, and every parish one constable and four tithingmen. The tithingmen were to account to the parish constable for the demeanor of the householders within their respective tithings, and the parish constable, in turn, was expected to make a similar report to the head constables of the hundred, "who shall present the same to the lieutenant and justices at their next sitting or before if cause require." Here we have an ideal system of frankpledge or *gesammtbürgschaft* which probably never existed in such symmetry anywhere. And it is not unlikely that Sir Ferdinando means simply to say, that he has drafted a "paper

[1] Chap. III, v.

constitution" of this character, possibly as an inducement to immigration.[1]

In Virginia the county and parish eventually absorbed all of the functions of local government. But in the early records, before the county was instituted, 'hundred' is employed co-ordinately with 'plantation' and 'parish' for the great estates or scattered settlements established after the foundation of Jamestown. Accordingly in 1619, when the first assembly of burgesses was called, side by side with the representatives of the 'cities,' 'plantations,' and 'gifts,' appeared two burgesses for each of three 'hundreds.'[2] In like manner burgesses for various hundreds were returned to several later assemblies previous to 1634, when the shire was adopted as the area of representation.[3]

The Virginia hundred had no organization, unless indeed the "commander of plantations" may be regarded as identical with the ancient hundredman. The commander was appointed and commissioned by the governor, and performed various military, police, and even judicial functions.[4] Again, only in a restricted sense can the hundred be regarded as the election

[1] The knight is confusing in his use of tenses. See his *Description of New England* in *3 Mass. Hist. Coll.*, VI, 83–5. Cf. Chap. III, 1.

[2] *Va. Coll. Records*, 9–10.

[3] Hening, *Statutes*, I, 147–9 (1629), 153–4 (1631–2), 178–9 (1632), 202–3 (1632–3), 224. Cf. Ingle, *Local Inst. of Va.*, 45. Representatives from 'parishes' are first mentioned in Feb., 1631–2: the "Upper" and "Lower" parishes of Elizabeth City: Hening, I, 154. These are called 'partes' in 1629–30: *Ib.*, I, 149.

[4] Hening, *Statutes*, I, 125, 126, 127, 131. The commander was also required to take the census (*Ib.*, 174–5), and see that the people attend church (*Ib.*, 144). Cf. Cooke, *Virginia*, 91. Mr. Ingle, *Local Institutions of Va.*, 46, seems to doubt whether there is any analogy between the commander and the hundredman, because the former was an *appointed* and not an elective officer. But it is by no means certain that the hundredman of the laws of Eadgar was chosen by the people. Cf. Stubbs, *Const. Hist.*, I, 102–3. Perhaps the prototype of the commander is the bailiff of the Norman hundred after it became a manor; but the office of bailiff is a differentiated form of the office of hundredman.

district; for the name is but one among several descriptions of the settlements from which the early burgesses were sent. It would seem that if any common technical designation were recognized for the representative unit as such, at least in 1619, it must have been *borough*.[1]

(*b*).—*The Hundred in Maryland.*

Almost from the very first settlement in Maryland the hundred became an important and vigorous local organization, taking the place, in some measure, of the township, and discharging functions which it had long ceased to perform, or never had performed, in the mother country.[2] It was probably the first local division established in the province. In the minutes of the assembly which met at St. Mary's, January, 1637/8—the first assembly whose records have been preserved—the freemen not summoned by special writ are mentioned according to the respective hundreds in which they resided;[3] and in the same minutes the word "county" first appears.[4]

[1] "Counties were not yet laid off, but they elected their representatives by townships. So that the boroughs of Jamestown, Henrico, Bermuda Hundreds, and the rest, each sent their members to the assembly. And hence it is, that our Lower House of Assembly was first called the House of Burgesses:" Stith, *Hist.*, 160. Cf. Hening, *Statutes*, I, 119–20; *Va. Col. Rec.*, 81. In 1619, the name hundred may already have been customarily used for the actual village or collection of houses, rather than for a whole estate or district. Cf. Ingle, *Local Inst. of Va.*, 44; and on the whole subject, Burke, *Hist.*, I, 202–3; Beverley, *Hist.*, 37; Doyle, *Eng. Colonies*, I, 158 f.; Channing, *Town and County Govt.*, 42; Cooke, *Virginia*, 115 f.; Hildreth, *Hist. of U. S.*, I, 118; Campbell, *Hist. of Va.*, 139; *Va. Col. Rec.*, 69–82.

[2] Dr. Wilhelm's *Local Institutions of Maryland* has been of constant service in the preparation of this sketch. But the *Proceedings and Acts of the Assembly*, and the *Proceedings of the Council*, in Browne's *Archives of Maryland*, have been diligently searched. I have also used Bacon's *Laws of Maryland;* Bozman's *History of Maryland*, and other authorities.

[3] *Archives*, 1637/8, pp. 2–4.

[4] *Archives*, p. 2.

The original settlers arrived in the province March, 1634, and before the first county—St. Mary's—was erected, several hundreds had probably been organized.[1] At a later day the freemen of St. Mary's hundred declared that it was the "antientest hundred and the first seated within this province."[2] New hundreds were organized, as the settlements extended and population increased, under authority of the governor's proclamation.[3] But for a long time St. Mary's was the only county subdivided.[4] To the assembly of 1638/9, as directed in the writs of summons,[5] representative burgesses were returned according to hundreds; and the first act passed during the session was one "for establishing the house of assembly and the laws to be made therein." In this it was declared that the delegates of the hundreds and others returned to the assembly in pursuance of the writs, "shall be and be called burgesses," in all respects as the burgesses of any borough in the English Parliament.[6] In form the act related merely to the assembly of 1638/9; but it was probably intended to establish a general

[1] On the origin of the Maryland hundreds see Wilhelm, 39 ff., 65; Bozman, *Hist. of Md.*, II, 45 ff. Doyle, *Eng. Colonies*, I, 286; Browne, *Maryland*, 48; Hanson, *Old Kent*, 7–10.

[2] *Archives*, 1650, p. 260.

[3] See, for example, the proclamation creating St. George's hundred: *Procds. of Council*, 1638, p. 70, and St. Clement's hundred: *Ib.*, p. 89; Bozman, *Hist. of Md.*, II, 45.

[4] As late as 1651, according to Wilhelm, p. 45. This appears from *Archives*, 1650/1, p. 313. In 1665 Charles, Calvert, Anne Arundel, and Kent were already divided into hundreds: *Procds. of Council*, p. 532.

[5] *Archives*, 1638/9, pp. 27–8. Wilhelm, *Local Inst. of Md.*, 42, says the hundred was made the election district by an order in council. I do not find the order in the *Proceedings of the Council*. The writs of the governor seem rather to have been issued under authority of the letter of Lord Baltimore, Aug. 21, 1638, granting the assembly the right to make laws, when approved by the major part of the freemen or their deputies. See Bozman, *Hist. of Md.*, II, 94–96.

[6] *Archives*, 1638/9, pp. 81–82. This act became a law and is regarded as the "constitutive act." Bozman, *Hist. of Md.*, II, 101 ff.; Bacon, *Laws of Maryland*, 1638, c. I.

rule.[1] Thus by implication the hundred was made the representative district. However, another measure proposed by the same assembly was more explicit, and was doubtless intended to supplement the preceding enactment. The freemen of each hundred, when summoned to a certain place by the commander, or in "defect" of a commander, by the high constable, or by the sheriff in case there be no constable,—were empowered to "elect and choose some one, two or more able and sufficient men" to represent them in the assembly.[2] This bill, for some unknown reason, did not become a law;[3] but thereafter the writs of the governor for the election of burgesses were issued entirely in accordance with its spirit. No definite apportionment of delegates according to population was made; but usually one or two for each hundred were returned, and sometimes the number was specified in the writs of summons.[4]

The hundred remained the election district until 1654, when the commissioners of Cromwell substituted county representation;[5] and from the resumption of the proprietary government by Lord Baltimore in 1658, burgesses were always returned by

[1] Bozman, *Hist. of Md.*, II, 102 ff., has an interesting discussion of this statute.

[2] *Archives*, 1638/9, p. 74.

[3] This act and the militia act, hereafter discussed, were two of the 36 bills which according to Bozman, were "engrossed for a third reading," but, for some unexplained reason, did not receive the final approval of the house: *Hist. of Md.*, II, 106, note, 104. Dr. Wilhelm—pp. 44, 52—is in error when he states, on the authority of Bozman, that these two acts were vetoed by the Proprietary; but all the acts of the assembly of 1637/8 were rejected by him: Bozman, *Hist. of Md.*, II, 67. It may be noted, however, that both acts are included by Mr. Browne in his index to bills passed. See the list of the 36 bills in Bacon's *Laws of Maryland*, 1638.

[4] See, for example, the writs to the assembly of 1640: *Archives*, pp. 87 ff.; and of 1641/2: *Ib.*, pp. 113 ff.

[5] *Archives*, 1654, p. 340: two burgesses were returned for St. Mary's county; but none for other counties are mentioned. During the session an act was passed by which county representation seems to be instituted: *Archives*, p. 341–2.

counties,[1] though, possibly, the hundreds were still used as polling districts.[2]

The use of the hundred as the unit of higher representation was an innovation upon the English custom; though, as we have seen, at a comparatively late date, the ealdor appeared for his hundred in the county court: and this may remind us of the position of the princeps in the council of the ancient völkerschaft.

In Maryland the hundred was also employed as the fiscal unit; and its functions in this regard were very important. Direct taxes for the support of the government were apportioned among the hundreds; and for this purpose the respective high constables were required to take a census of "taxables" and "tithables:" for in Maryland as in Virginia a rate upon polls constituted the usual, if not the only, mode of taxation.[3] The levy for the entire province was made by a commission, generally consisting of one or more representatives from every hundred, or from every county not yet subdivided into hundreds;[4] and an order of the assembly in 1649 shows that these commissioners were elected by the people.[5]

During the eighteenth century, previous to the Revolution, the levy of the public or county charge was made by the commissioners or justices of the county court;[6] but the constables of the hundreds continued to take the lists of taxables as in early days.[7]

[1] *Archives*, Mch., 1657, p. 369.

[2] Wilhelm, *Local Inst.*, 45.

[3] See the "Act concerning taxable persons," *Archives*, 1662, p. 449. Taxables are here defined as all "male children borne in the province," of 16 years and upwards; all male servants imported "att or before the age of tenn yeares;" and all slaves, male or female, of ten years and upwards. Cf. *Ib.*, 537. Dr. Wilhelm, *Local Inst.*, 47, as examples of levies on the poll, cites *Archives*, 1647/8, p. 232: 1649, p. 237; 1650, p. 269; 1663, p. 506.

[4] Wilhelm, *Local Inst*, 46–7; *Archives*, 1642, p. 142.

[5] *Archives*, 1649, p. 238. Cf. *Ib.*, 1650, p. 298.

[6] Bacon, *Laws of Maryland*, Act of 1704, c. 34; Act of 1748, c. 20.

[7] Bacon, *Laws of Md.*, Act of 1715, c. 15, § 3; Act of 1719, c. 12, §§ 1, 6, 7.

The hundred was also employed in Maryland as the military unit—a revival in the new world of one of its most ancient and characteristic functions. The first measure proposed by the assembly relating to the militia is conceived in the spirit of Assize of Arms. It is provided that "every housekeeper or housekeepers within this Province shall have ready continually upon all occasions within his, her, or their house, . . . for every person able to bear armes, one serviceable fixed gunne of bastard muskett boare, one pair of bandeleers or shott bagg, one pound of good powder, foure pound of pistol or muskett shott, and sufficient quantity of match for match locks and of flints for firelocks, and before Christmas next . . . a sword and belt." Once a month the captain of the band or other officer is required to demand at every dwelling house a view of arms; and those found "deficient" are to be amerced "in his discretion so it exceed not thirty pound of tobacco for one default." Upon any alarm every householder of every hundred is to send to the place appointed one man completely armed for every three or more men in his family able to bear arms, or two for every five, and so "proportionably."[1] This bill did not become a law;[2] but similar provisions were subsequently embodied in the orders of the council and acts of the assembly.[3]

At an early day the hundred became the militia district, each being required to maintain its "trained band." The band was commanded and disciplined by officers appointed usually by the governor in council.[4]

[1] *Archives*, 1638/9, pp. 77–8; also printed in Bozman, *Hist. of Md.*, II, Appendix, pp. 609–10; cf. *Ib.*, 145, 163; Wilhelm, *Local Inst.*, 52.

[2] It was one of the "engrossed" bills already mentioned. Bozman, *Hist. of Md.*, II, 106; but the "captain of the millitary band" is given power to provide for the safety of the province in a brief clause of another act, which did pass on the last day of the session. *Archives*, p. 84; Bozman, II, 106.

[3] See, for example, *Archives*, 1642, pp. 196–7; 1649, pp. 253–255; 1654, p. 347. *Proceedings of Council* (1636-1667), pp. 86, 102 ff., 107, 132, 163, etc.

[4] See the commission of Jno. Boteler as captain of Kent Island militia, dated May 27, 1638: *Procds. of Council*, p. 75. This is the first act of the council

The most interesting of the various acts relating to this subject is that of 1649, where the assembly of freemen in each hundred is recognized as a genuine folkmoot with power to enact and enforce local ordinances relating to the common safety. Any damage to individual property sustained in execution of such by-laws is to be made good by a "leavy . . . upon the hundred by the sheriffe" and "assessed by three able persons chosen by the governor . . . out of some other hundred." The cry of danger is to be carried from hundred to hundred by means of "rounders." The discharge of five guns or more by such rounders is to constitute "a generall and true allarm to all the inhabitants of the province;" and three guns or more from any inhabitant is to be held a "true allarm" in like manner. Any neglect to answer the signal renders the delinquent liable to a fine of one hundred pounds of "casked" tobacco. Arms and ammunition must be kept ready by every householder.[1]

The hundred remained the military unit throughout the provincial era;[2] and it needs but a glance at the proceedings of the council relating to the Indian troubles to discover that the function was very important and frequently called into service. Moreover as in Virginia the militia organization furnished a valuable preparation for the great struggle of the Revolution. "When the conflict of 1776 began," says Dr. Wilhelm, "it was the hundreds of Maryland that responded to the 'alarm' sounded by the towns of Massachusetts, and

relating to the militia in Mr. Browne's collection. Even sergeants were commissioned by the governor: *Procds. of Council*, pp. 104, 118. See also *Ib.*, pp. 102, 103, 132–3, 163, 191, 282–90, 320, 344, 349, 350, 364, 523. A comparison of these passages will show that special commissions to leaders of expeditions against the Indians, granting extraordinary powers to "press" men and supplies, were often issued; and that the hundred is clearly recognized as the military unit.

[1] *Archives*, 1649, p. 253. Compare Bozman, *Hist. of Md*, II, 364 f.

[2] Wilhelm, *Local Inst.*, 54. See Bacon, *Laws of Md.*, Act of 1715, c. 43, where, however, the hundred is not expressly mentioned as the militia district.

that echoed the news to the counties of Virginia and the parishes of Carolina. The veterans of the Indian wars and the raw recruits of the militia by common instinct gathered together in their respective hundreds to answer the call of their New England comrades."[1]

The most important officer, really the constitutive[2] officer, of the hundred was the high constable. He was originally appointed by the governor,[3] later by the justices,[4] and performed a variety of duties. For example, he received and served the writs of election;[5] took the census of taxables,[6] and served processes. But, as in the mother country, his police duties were most important and characteristic. He was especially entrusted with the keeping of the peace and the arrest of all rioters and law breakers.[7]

Superior to the constable, apparently, in rank, but of less constitutional importance, was the commander, who was also appointed by the governor. Like the commander of the county, he was a kind of marshal or military chief; but the

[1] *Local Institutions*, 54.

[2] The issue of the commission appointing the constable seems to have been the first step in the organization of the hundred. See, for example, the commission of Robert Vaughan as "highe constable" of St. George's hundred: *Procds. of Council*, Jan. 5, 1637, p. 59; and of Jno. Robinson for St. Clement's: *Ib.*, p. 89.

[3] But the justice of the peace of St. George's hundred was once commissioned to appoint the constable: *Procds. of Council*, p. 70. This is an early precedent for the later practice of appointment by the county commissioners or justices.

[4] Bacon, *Laws of Md.*, Act of 1715, c. 15. The assembly attempted to vest the appointment of constable in the commander of the hundred but the act failed to pass: *Archives*, 1638/9, p. 55; Bozman, *Hist of Md.*, II, 106.

[5] Examples, *Archives*, 1641/2, p. 115, where the constable of St. Clement's receives a writ similar to that of the sheriff for the other hundreds of St. Mary's county for the same assembly. Cf. Bozman, *Hist. of Md.*, II, 190. In 1642 the writs were apparently issued to private persons; but some of those mentioned may have been constables: *Archives*, 1642, p. 128. Later the sheriff was the returning officer.

[6] *Archives*, 1676, p. 538; *Procds. of Council*, 1652, p. 288.

[7] See the oath of the constable: *Archives*, 1661, p. 410.

commander of Kent had also the general administration of justice — being, in fact, a deputy governor.[1] Commanders were not always appointed, and in that case the duties of the office devolved upon the constable or the sheriff. Other officers of the hundred were the tobacco viewer,[2] the tax assessor—the only elective officer—and the road overseer.[3]

The hundred of Maryland was a living organism, in character reminding one far more of the institution in the days of Eadgar than in those of the Stuarts. The "court" for the election of burgesses or assessors, the assembly for the enactment of by-laws, and even the meeting to frame petitions to the assembly[4] or indite an address to the king,[5] each discharged the functions of a real folkmoot, thus in part supplying the place of a town-meeting for the purposes of self-government. But after the Revolution the hundred fell rapidly into decay, surviving for a time only as a constable's precinct; and the constable "had degenerated into a mere messenger and factotum of the county justices." In 1824, finally the organization became entirely extinct.[6]

(*c*).—*The Hundred in Delaware.*

The three counties of Kent, Sussex, and New Castle, which constitute the present state of Delaware, were included in the territory claimed by William Penn; and until the beginning of the eighteenth century they remained under the same legis-

[1] See the commissions to Evelyn and Brent: *Procds. of Council*, pp. 59, 88. Cf. Bozman, *Hist. of Md.*, II, 614, 44, 138; Wilhelm, *Local Inst.*, 55–6. The commander of Kent must be distinguished from the captain of the "band:" see Boteler's commission as captain: *Procds. of Council*, p. 75.

[2] *Archives*, 1640, p. 97.

[3] Wilhelm, *Local Inst.*, 60, note 5. A justice of the peace was appointed for St. George's hundred: *Procds. of Council*, p. 70.

[4] Wilhelm, *Local Inst.*, 55, 58. He cites examples in *Archives*, 1676, p. 498.

[5] Wilhelm, *Local Inst.*, 58.

[6] Wilhelm, *Local Inst.*, 62–3. Cf. *Laws of Maryland*, 1824.

lative control as Pennsylvania. After their erection into a separate government with a legislature of their own, their institutional history runs parallel, in some measure, to that of the larger colony. This is true especially of county organization. In Pennsylvania local government is at first lodged almost exclusively in the hands of the county authorities; but little by little the township is allowed to participate in the work of administration, until at the Revolution there is a fair balance of power between the two bodies.

A similar process takes place in Delaware. Local authority at first centers in the county court of quarter sessions; but in this instance *hundred* and not *township* is the name of the subordinate division which is gradually employed for a variety of administrative purposes. The hundred of Delaware, however, is really a township with limited powers. Unlike the early hundred of Maryland it has no folkmoot; but its relation to the county is entirely analogous to that of the township in Pennsylvania and those western states which have taken her institutions as a model.[1]

The division of the counties into hundreds may have existed from the beginning of the eighteenth century. At any rate, it had occurred before 1740, when the courts of quarter sessions were authorized to appoint a suitable number of fence viewers for each hundred of their respective counties.[2]

The hundred was also employed as a highway district. By an act of 25 George II, the quarter sessions, at their May meeting, are required to appoint in each hundred "one or more discreet and substantial . . . inhabitants to be . . . overseers of highways, causeways, and bridges," with the usual powers.[3] Subsequently the right of appointment was transferred to the levy court.[4] Moreover in 1796 a dual sys-

[1] Cf. Chap. IV, II, (*a*).

[2] By 13 Geo. II: *Laws of Delaware*, 1700–1796, I, 181. This is the first mention of the hundred which I find in the laws.

[3] *Laws of Delaware*, I, 316–24.

[4] *Laws of Delaware*, II, 1280 (1796).

tem of road administration seems to have been instituted. Three "commissioners of roads" are periodically appointed for every hundred by the levy court of the county; and the overseers are placed under their general control.[1]

In like manner overseers of the poor were nominated for the hundreds. An act of 1775 provides that each overseer for the time being shall report the names of three electors of his hundred to the justices who shall appoint one of them as overseer for the ensuing year.[2] But in 1792 the duties of the office were transferred to the constables of the various hundreds.[3] Each hundred has one constable appointed annually by the quarter sessions from a list of three freeholders, which, as in the case of the overseer of the poor, is presented by the retiring officer.[4] The constable is required to reside in his hundred;[5] and vacancies in the office may be filled by the next three justices of the peace.[6]

The only elective officers of the Delaware hundred are the assessor of taxes and the inspector of elections.[7] The procedure observed in the election of members of the assembly is similar to that adopted in Pennsylvania by the act of 1766, though differing somewhat in detail.[8] The names of the persons chosen as inspectors are returned by the judges of election in the respective hundreds to the sheriff or other election judge of the county, by whom they are proclaimed on the morning of election day in presence of the assembled voters.[9] All the

[1] So in Sussex and Kent: *Laws of Delaware*, II, 1267, 1281–2. Mention is also made of road commissioners appointed for each hundred by the assembly, vacancies to be filled by the levy court: *Ib.*, II, 1263 ff., 1275 ff.

[2] *Laws of Delaware*, I, 544–561. Overseers of the poor are also mentioned in 1764: *Ib.*, 414–15.

[3] *Laws of Delaware*, II, 1040.

[4] *Laws of Delaware*, I, 476–7 (1770).

[5] *Laws of Delaware*, II, 935.

[6] *Laws of Delaware*, I, 478.

[7] *Laws of Delaware*, I, 429 ff., (1766).

[8] See Chap. VIII, III, (*e*).

[9] In the hundred, the judge of elections, in choosing assessors and inspectors, was the collector of taxes, or in his absence, the overseer of the poor. In

inspectors from the entire county are required to attend the polls, and each is furnished with a certified list of the electors of his hundred. Two or more clerks of election are appointed by the sheriff, or in his absence, by the majority of inspectors. A ballot box for each hundred is provided by the sheriff; and into this box, in the presence of the proper inspector, the votes of the hundred are placed. At the close of the polls, the boxes are opened by the sheriff and the ballots in each counted. Then all the ballots are mixed and placed in a single box. Finally they are read one by one and delivered to the clerks for record.[1]

But the hundred of Delaware is important chiefly as an area for rating. The early fiscal system as established in 1743 by an act for "raising county rates and levies," possesses several very interesting features.[2] The electors of each hundred are authorized to choose annually "one substantial freeholder" as assessor, whose name is returned by the sheriff to the justices of the general sessions. In November a "levy court" is held at the court house of the county for the purpose of calculating the amount necessary to be raised by taxation for the ensuing year. The levy court is composed of all the assessors from the various hundreds of the county, or a majority of them, together with three or more of the justices of the peace, and eight grand jurors. On the receipt of a precept from the clerk of the peace, the constables are required to take the lists of taxables in their respective hundreds; and these lists are delivered to the court at the November meeting. After receipt of the lists the assessors, as a body, proceed to make the assessment for the

the county, the judge was the sheriff, or in his absence, the coroner; or the justices of the peace, in the absence of both sheriff and coroner: *Laws of Delaware*, I, 429. In 1772 it was provided that the sheriff or coroner and the inspectors should be the judges: *Ib.*, 500 ff.

[1] *Laws of Delaware*, I, 500 ff., (1772), 429 ff.

[2] The fiscal system of Delaware should be compared with that of Pennsylvania, as developed by the acts of 1696, 1724, 1732, and 1779. See Chap. VIII, III, (*d*).

entire county. Finally, after an interval of four weeks, the grand jurors, assessors, and justices assemble as a "court of appeal," to hear complaints and adjust any inequalities in the assessment; and at this meeting a collector is appointed for each hundred of the county.[1] A county treasurer is also nominated every three years by the court of appeal.[2]

The striking feature of the system just described is the representation of the hundred on the county board, involving as it does the essential principle of the representative township-county plan already discussed in detail.

No important change in the fiscal administration was made until 1793, when an entirely different system was introduced. The assessors of the hundreds continue to perform their functions as before. But for the old mixed courts of levy and appeal, a board of commissioners is substituted, consisting respectively of nine members in Kent, ten in Sussex, and eleven in New Castle. The commissioners are chosen by popular vote, one or two—as specified in the statute—for each hundred of the county; and they are invested with all the powers hitherto possessed by the courts of levy and appeal.[3]

Such was the general character of the hundred organization in Delaware at the close of the last century; and such it has remained to our own times. Assessors and inspectors are still chosen by the freemen;[4] and the hundred is now the polling district for all elections. The levy court is still composed of commissioners, chosen by ballot every four years,

[1] Act of 16 Geo. II: *Laws of Delaware*, I, 257–67. Cf. the act of 1766: *Ib.*, I, 429 ff.

[2] By 25 Geo. II: *Laws of Delaware*, I, 329–30.

[3] *Laws of Delaware*, II, 1086. The six tax commissioners for the public levy instituted in 1796 are not to be confused with the ordinary county commissioners. The former were appointed by the governor: *Ib.*, II, 1247 ff.

[4] In each hundred of New Castle county two road commissioners are elected; and they are authorized to appoint an overseer of highways and a collector of the road tax: *Laws of Delaware*, 1874, 324–5.

and by that body constables, collectors, and overseers are appointed for the same districts as of old. In short, the hundred of Delaware remains what it was in the eighteenth century—the constitutional unit of the state.[1]

We have now traced the history of the second order of social groups through the various phases of its growth and decay. Everywhere in the old world, it has appeared as a more or less artificial organism employed for special functions. Moreover with the development of new administrative methods better adapted to the needs of the modern state, it has been found superfluous. The fittest has survived. Town and county, in America at least, are as significant members of the political constitution as they were in the days of Eadgar. And the last chapter in the history of the hundred is not the least interesting. In a little corner of our greater England it is still a living body. But that body is no longer an organization placed between the township and the shire; it is itself a rudimentary township, employed, however feebly, for the purposes of self-government.

[1] *Laws of Delaware*, 1852, pp. 11 ff., 47 ff., 95–6; *Ib.*, 1874, pp. 3 ff., 60 ff.

PART III

THE SHIRE

CHAPTER VI.

EVOLUTION OF THE SHIRE ORGANISM.

I.—The Tribe.

(*a*).—*The Phulê.*

In studying the township and the hundred we have seen that in each case the territorial was preceded by a personal organization. The same is true of the third order in the ascending scale. The prototype of the shire appears to be the nomadic tribe.[1] But the principle of the tribal union is a strange one looked at from a modern standpoint. The members of the same tribe, like those of the same gens, are held together by the double bond of blood relationship, real or assumed, and the worship of a common ancestor.

Such doubtless was the constituent principle of the phylic or tribal groups found everywhere among the Greeks; though in historic times the word *phulê* may always have designated a local or territorial as well as a gentile body.[2]

[1] Freeman, *Comp. Pol.*, 118, 120.

[2] Such is the well known view of Schömann as opposed to that advanced by Grote in the *History of Greece*, III, 50 ff., IV, 128 ff. Schömann contends, in the case of the Ionic phulai, that from the time the separate communities of Attica were united in a single state, accomplished according to legend under Theseus, "there can be no doubt that the Phylae and their divisions were associations connected by place as well as by relationship. The members of the same Gens, Phratry, and Tribe were also, in primitive times, residents of the same localities, and each of these divisions had its own district; so that the country was divided into as many districts, large and small, as there were Gentes, Phratries, and Tribes:" *Athenian Constitutional History*, 11. Cf. his *Antiquities of Greece*, 317–19, 128 ff.

Very little information is preserved as to the officers and functions of the Hellenic tribe. The chief of the Ionic phulê was the phulo-basileus or tribe-king, elected probably by the tribesmen in their general assembly. He was primarily the high priest of his tribe as were the archons of the gens and phratry of their respective groups. He may also have been the military leader of the assembled phratries; and possibly the judge in criminal matters.[1]

From time to time the members of each phulê met in a general assembly. The business transacted related chiefly to the common worship; but, without doubt, here also in early days were considered such other measures as the primitive political life required. For there must have been a time when each phulê was a state in itself.[2] But when history dawns the polis has already taken its place as the highest form of political organization.[3]

(*b*).—*The Tribus.*

In the earliest traditions of Rome the genealogical tribes—the Ramnes, Tities, and Luceres—have likewise outgrown the nomadic stage and are already incorporated in a single city. The whole account of the foundation of Rome is but a record of the transition from the sovereignty of the separate tribes to

[1] The military functions of the basileus are, of course, conjectural; and it is a question whether he had judicial functions in criminal cases. On the phulê see Morgan, *Ancient Society*, 240–42; Wachsmuth, *Hist. Ant.*, I, 332 ff.; Müller, *Doric Races*, II, 76 ff.; Schömann, *Antiquities*, 470, 321, 327, 366; Fustel de Coulanges, *Ancient City*, 158, 167; Smith, *Dict. Ant.*, "Tribus," p. 1152, and "Phylobasileus," p. 899; Gilbert, *Handbuch*, II, 305; Grote, *Hist. of Greece*, I, 583 (short edition).

[2] "From what remains to us of the tribe we see that, originally, it was constituted to be an independent society and as if there had been no other social power above it." Fustel de Coulanges, *Anc. City*, 158.

[3] Freeman, *Comp. Pol.*, 86 f.

a confederation of them all. The city is thus the result of the coalescence and expansion of its "triple family."[1]

In the legendary narrative the religious tribes appear in a shadowy form. Since they have become parts of a larger community, they are entirely without corporate organization of their own. They are mere groups of curiae and therefore local as well as genealogical divisions. They may once have had each a tribunus or chief; and possibly they were used as administrative units; but nothing certain is known.[2] The political centre of the confederation is the comitia curiata—the assembly of the curies and not of the tribes. The tribe has no meeting of its own. But it should not be forgotten that the city is a later stage than the independent tribe: the new state overshadows the older völkerschaft. It seems as if there were almost a conscious effort to suppress it politically in favor of the united kingdom.[3] But the spirit of early tradition and the analogy of the other Latin communities go to show that the tribe was once a sovereign body. It must have had its own comitia or folkmoot, though the fact cannot be proved from existing records.[4] But in Rome as in Greece the old religious groups gave place, at a very early day, to artificial territorial divisions. Just as the old genos and phulê were replaced, for political purposes, by the new local demes and tribes of Kleisthenes; so the gentile tribes were superseded by the territorial pagi and tribus of the Servian constitution. But in neither case did the one system grow entirely into the other: the new and artificial organism existed side by side with the

[1] *Tribus* seems to be derived from *tri* an old form of *tres*, three, and *bus*, family; Phulê is of cognate origin. See Skeat, 'tribe;' also Mommsen, *Geschichte*, I, 63, 65, 66, etc.; *Staatsrecht*, III, 95.

[2] Mommsen, *Staatsrecht*, III, 97–8, 100, 110; Lange, *Röm. Alterthümer*, I, 282–4, 505.

[3] On the tribus see further Mommsen, *Geschichte*, I, 35–40; on its place in the city, *Ib.*, I, 64–6; Compare Morgan, 307; Smith, *Dict. Ant.*, 'tribus,' pp. 1155 ff.

[4] This view seems to be sustained by Mommsen, *Staatsrecht*, III, 96.

old and natural organism;[1] but the latter became a mere survival with little significance in the life of the people.

To study the tribe in process of actual transition from a nomadic to an agricultural life and in its territorial aspect, we will turn to the institutions of our own ancestors.[2]

II.—The Völkerschaft.

(*a*).—*The General Assembly.*

In the *Germania* of Tacitus the civitas or völkerschaft appears as a nation, an independent state. It is the tribe in its constitutional aspect.[3] There is as yet no confederation of all the völkerschaften of an entire race or stamm: the union of many tribes in one kingdom will constitute a later and higher phase of development. The constitution of the völkerschaft is usually described as resting on a territorial basis; but this conception requires an important modification. The people, it is true, are already entering upon the agricultural life in permanent villages with well defined marks. The hundreds are local administrative districts settled by groups of kindred; but the civitas as a whole finds its only expression in the

[1] Of course many of the old *demoi*, or districts settled by the gentes, may have been identical with the new demes. Schömann, *Ath. Const. Hist.*, 64 f.; *Antiquities*, 365 ff.; Freeman, *Comp. Pol.*, 108–9; Morgan, *Anc. Soc.*, 300; Wachsmuth, I, 394 ff.; Smith, *Dict. Ant.*, 'pagi' p. 848; Grote, III, 63. At Rome the new tribes seem to have been closely connected with the districts of the early gentes. Freeman, *Comp. Pol.*, 109, 105.

[2] Our knowledge of the primitive genealogical tribe does not, of course, depend entirely upon the fragmentary references of Greek and Roman writers, nor yet upon the biblical history of the tribes of Israel. The Arabs, Tartars, and American Indians furnish living examples, though among non-Aryan peoples. On the Indian tribal organization Mr. Morgan's *Ancient Society* is indispensable.

[3] *Germania*, 10, 12–15, 19, 25, 30, 37, 41, contains the chief references to the subject. See Stubbs, I, 27–8; Waitz, I, 140; Thudichum, *Der altdeutsche Staat*, 20 ff.

gathering of the folk in arms.[1] The conception of territorial sovereignty, of a definite local jurisdiction on the part of the state, as opposed to a tribal sovereignty, is yet unknown; even among the Franks it is not clearly developed until the beginning of the eleventh century.[2]

The primitive bond of common religion and common blood is still strong in the völkerschaft. Tacitus expressly states that in the army the warriors are grouped according to families and kindreds;[3] while the sacred groves and other consecrated places for the general assembly,[4] the duties of priests in the army and in the moots, attest the survival of the religious character of the tribe.[5]

The life of the völkerschaft finds its centre in the general meeting or council of the freemen; and the latter as the immediate predecessor of the shiremoot requires particular notice.

Meetings of the civitas are of two kinds: regular and extraordinary. The former are held at fixed times and at close intervals, usually at the new and full moons.[6] The assembly is held in the open air, and the people appear in arms, those from each pagus or hundertschaft doubtless forming a distinct band, as in the case of the Homeric phratry.

The gathering of the host and the assembly of the people are one and the same.[7]

Silence is proclaimed by the priests, and they also have power to enforce the special peace—the thingfriede—under which all are brought on this occasion.[8] The king or princeps or perhaps some one chosen on account of age, wisdom,

[1] Waitz, *Verfassungsgeschichte*, I, 315.

[2] Maine, *Ancient Law*, 99–104.

[3] *Germania*, 7: *familiae et propinquitates.* Waitz, *Verfassungsgesch.*, I, 79.

[4] *Germania*, 9, 39; Waitz, I, 322; Grimm, *Rechtsalt.*, 793, and many authorities there cited.

[5] Waitz, *Verfassungsgesch.*, I, 326, 336.

[6] *Germania*, 11; Waitz, *Verfassungsgesch.*, I, 319.

[7] *Germania*, 7; Waitz, *Verfassungsgesch.*, I, 79, 149, 325.

[8] *Germania*, 11; Waitz, *Verfassungsgesch.*, I, 326.

nobility, or military fame, takes the lead in the discussions;[1] but the presiding magistrate, or moderator, is probably but slightly distinguished from the common freeman, save by a more conspicuous place in the meeting.

Questions of minor importance are decided in separate councils of the chiefs or principes. Graver matters, such as war and peace or alliances, come before the whole people; but even these are previously considered in the council of the *principes:* and the council board is usually the "mead-bench,"[2] which occupies so prominent a place in the early epics.

The assembly of the folk discharges the chief legislative and executive functions, and it is also the supreme judicial tribunal, especially for capital cases; but the usual court for private causes is the meeting of the pagus or hundertschaft.[3]

In the deliberation assent is given by the striking of spears, and applause by the clashing of spears and shields; opposition is indicated by loud shouts.[4]

In addition to the business of a public character, much of a more special nature is transacted: such as emancipation and adoption, the witnessing of transfers, and the clothing of the youth with arms.[5]

(*b*).—*The Magistrates.*

The question as to the officers of the völkerschaft is an interesting one but full of perplexity. In the time of Tacitus

[1] Waitz, *Verfassungsgesch.*, I, 327; Stubbs, *Const. Hist.*, I, 28.

[2] See Waitz, *Verfassungs.*, I, 330, who thinks this custom may have given rise to the later practice, mentioned by Grimm, *Rechtsalt.*, 314, of rendering judicial fees and penalties in beer.

[3] *Germania*, 12. Compare Waitz, I, 322–4, 333; Thudichum, *Der altdeutsche Staat*, 48–50. This is insisted upon by Sohm, *Altdeutsche Reichs- und Gerichtsverfassung*, 7, passim.

[4] *Germania*, 11; *Hist.*, V, 17; Cæsar, VII, 21; Grimm, *Rechtsalt.*, 770 ff.; Waitz, I, 330.

[5] Waitz, *Verfassungsgesch.*, I, 330–2; *Das alte Recht*, 144 ff.

some—perhaps a majority—of the tribes possess no single chief magistrate; but in the general assembly are elected principes who preside in the courts of the hundertschaft.[1] In these tribes the only central power is the folkmoot. But in other völkerschaften a king is chief. He is elected for life from the nobles in the general council. But it would be a mistake to regard the völkerschaft over which a king presides as a kingdom in the modern sense. The *reges* of Tacitus should rather be compared with the *phulo-basileis* of the Ionic tribes, though the political or secular attributes of the former are more pronounced;[2] and the Teutonic tribe-kingdom is a stage in the development of the united sovereignty of a later age.[3]

In time of war supreme command is given to a *dux* or *herzog*.[4] Neither noble nor princeps nor even the king is necessarily chosen as leader of the host: the *dux* is appointed solely for his valor and experience in war;[5] but doubtless for this very reason the king or a princeps is most frequently selected.[6]

[1] *Germania*, 12. Waitz seems to think it possible that there may have been two kinds of magistrates to which Tacitus gives the name of *principes:* those of the hundertschaften and the single princeps of the civitas. The former constituted the council which prepared business for the assembly. *Verfassungsgeschichte*, I, 242. For the opposite view see Thudichum, *Altd. Staat*, 38.

[2] The use of the same name for different things in Teutonic as well as classic history, is a fruitful cause of error. Cf. Morgan, *Ancient Society*, 242.

[3] On the character of the early German kingship see Sohm, *Reichs-und Gerichtsverfassung*, 4, 9; Waitz, *Verfassungsgeschichte*, I, 273–314; Stubbs, *Const. Hist.*, I, 26–8, 175; Roth, *Beneficialwesen*, 2 ff.; Schulte, *Reichs-und Rechtsgeschichte*, 38–9; Grimm, *Rechtsalterthümer*, 229 ff.; Löw, *Reichs-und Territorialverf.*, 29 ff.; K. Maurer, *Krit. Ueb.*, II, 431 ff.; Kemble, *Saxons*, I, 137 ff.; Freeman, *Comp. Politics*, 162 ff.

[4] *Germania*, 7; Waitz, *Verfassungsgeschichte*, I, 250, 382.

[5] *Germania*, 7. Cf. *Ib.*, 13; Stubbs, *Const. Hist.*, I, 30.

[6] Waitz, *Verfassungsgeschichte*, I, 310; Stubbs, *Const. Hist.*, I, 27.

(*c*).—*The Comitatus.*

The principes, or official magistrates, enjoy the special privilege of maintaining a *comitatus* or *gefolge*—a band of military companions. No private noble or other person, save the king and dux, possesses this right: it is an incident of the official rank of the elected magistrate[1] The comites form the retinue and table-companions of their chief in time of peace, and in battle they fight for him alone, while the princeps fights for victory.[2]

Such in rough outline was the constitution of the völkerschaft at the beginning of the second century of our era; and the few details recorded by Caesar, a century and a half earlier, are in all important points in harmony with it, though the transitional character is more apparent.[3]

(*d*).—*The Old Saxon Völkerschaft.*

It is with great satisfaction also that several centuries later we find these elements of the common Germanic constitution still preserved among the Saxons who remained in the continental home of our ancestors. Bede, writing in the eighth century, before they had been christianized by the Franks, states that they had no king, but that "a great number of satraps were set over the nation." These satraps, manifestly the *principes* of Tacitus, presided in the lower courts, and in time of war were superseded by a chief chosen from their own number by lot.[4]

[1] On the whole much discussed question of the comitatus, see Waitz, *Verfassungsgechichte*, I, 344–74 (Das Gefolge), 220–72 (Die Fürsten); Roth, *Beneficialwesen*, 1–33; Thudichum, *Altd. Staat*, pp. 12–20; Stubbs, I, 24, 26, 251, note; Konrad Maurer, *Krit. Ueb.*, II, 396–403.

[2] *Germania*, 14.

[3] *De Bello Gal.*, VI, 21 ff.

[4] *Ecc. Hist.*, V, 10: *Mon. Hist. Brit.*, p. 258; Stubbs, *Const. Hist.*, I, 41.

Hucbald, writing in the middle of the tenth century of the Saxons of the eighth, says: "The race was, as it still is, divided into three orders; there are there those who are called in their tongue Edlingi; there are Frilingi, and there are what are called Lassi; words that are in Latin *nobiles*, *ingenui*, and *serviles*. Over each of their local divisions or *pagi*, at their own pleasure, and on a plan which in their eyes is a prudent one, a single *princeps* or chieftain presides. Once every year, at a fixed season, out of each of these local divisions, and out of each of the three orders severally, twelve men were elected, who having assembled together in Mid-Saxony, near the Weser, at a place called Marklo, held a common council, deliberating, and acting, and publishing measures of common interest according to the tenour of a law adopted by themselves. And, moreover, whether there were an alarm of war, or a prospect of speedy peace, they consulted together as to what must be done to meet the case."[1]

Here the princeps seems to be chosen by the *pagus*, and the general assembly, which is still the center of the national life, meets but once a year. The most remarkable innovation, however, is the system of representation, showing that local institutions among the Saxons of the continent had developed on the same lines as among the colonists of Britain. "The assembly," says Stubbs, "was a representative council of the most perfect kind; and, stated simply, must have been as much in advance of the constitutional system of other countries in the tenth century as it had been in the eighth: for the double principle of representation, local and by orders, involves the double character of the gathering: in one aspect it is an assembly of estates, in another the concentration of local machinery: and in either it is a singular anticipation of polities which have their known and historical development centuries later. It may indeed be reasonably doubted whether such a complete and symmetrical system can have existed; it

[1] Stubbs, *Const. Hist.*, I, 44.

would be as startling a phenomenon if it existed only in the brain of the Frank monk, as it would be in proper history. Nor have we any distinct information about it from any other source."[1]

III.—The Old English Shire.

(*a*).—*The Origin.*

Among the English settlers of Britain, in the tenth century, the völkerschaft has entered upon a new stage of development. After four centuries of strife and experiment the isolated tribal states have become incorporated in a confederation. The autonomous völkerschaft has become a shire, a share in the united kingdom.

The völkerschaft did not enter directly into the new state: there had been many previous aggregations and dissolutions of groups of tribes. One by one the so-called heptarchic kingdoms took their place in the West Saxon confederation, and these kingdoms in their turn had been made up of other states by a similar process. During the long interval of conflict and growth the history of the local organizations can be but faintly traced: even the names are wrapped in obscurity. The origin of the shire, like that of the hundred, has been ascribed to Aelfred; and, though the student of political organisms hesitates to accept what, at first glance, seems inconsistent with the law of continuity, there is little doubt in this instance that the tradition is true in its general import: both shire and hundred, *as parts of the united kingdom*, probably originated under Aelfred or his immediate successors.

[1] *Const. Hist.*, I, 44–5. On the narrative of Hucbald, Waitz, *Verfassungsgeschichte*, I, 341, says: Die Erzählung erregt manche Bedenken, doch werden wir sie nicht ganz verwerfen dürfen. In Vol. III, 114, note, he does not positively reject the narrative, but hesitates to accept it as entirely trustworthy. See also Thudichum, *Altd. Staat*, 44, note. For a full discussion of the meeting of the völkerschaft see Waitz, *Verf.*, I, 315–44; Stubbs, I, Chaps. II, III; Thudichum, *Altd. Staat*, 45–55.

"By a strange chance," says Freeman, "the group answering to the German gau, the English shire, bears a name[1] which expresses the exactly opposite idea to that of union."[2] Indeed, when all England had passed into the hands of a single king, there must have occurred something very much resembling a mechanical division. But in reality it was but a recognition of original natural groups as co-ordinate members of a new organism. Scholars are now agreed that the first English shires were merely the old tribal states, each bearing a new and common name.[3] It would seem as if when East Anglia, Mercia, or Northumberland, was definitely brought under West Saxon supremacy, each was dissolved into its original elements—the primitive völkerschaften of which it was composed; and as if in recognition of their nationality, of their equal rank and power, each of the latter was called a shire or *share* of the new commonwealth.

Looked at in this light there is more than a superficial analogy between the tribus of Rome and the shires of England. Before the groups to which the former name was given became the "three families" of the new city-state in which they were incorporated, each as a distinct and sovereign state in itself must have possessed its own national name with which the numerical designation of *tribus, tres,* would have been inconsistent.[4] So the English völkerschaften before they became "parts" of a greater whole, had their own names as distinct peoples. They were East Saxons or South Saxons,

[1] Scir, from A. S. *Sciran*, to shear, to cut.

[2] *Comp. Pol.*, 124.

[3] Of course the present geography of the shires is largely the result of centuries of growth. See Pearson, *Historical Maps*, 27–28. But on the origin and extension of the shire system see particularly Green, *The Conquest of England*, 221–31.

[4] Perhaps they were called Ramnes, Tities and Luceres, according to tradition. There is a certain incongruity, historically, in the use of *tribe* or *tribal* as descriptive of the English, Teutonic, or Roman völkerschaft: the very name implies an aggregation of *Völker* in the fourth order of political organism—the city or the kingdom.

North Folk or South Folk, Sumersaetas or Dorsaetas. It is an interesting corroboration of this theory of the origin of the shire that in some cases the word 'shire' has never been subjoined to the national name. "It is certain also," says Freeman, "that there are many English counties to which the name *shire* has never been applied down to our own times."[1] If the primary notion of *scir* as something "torn off" or "sheared off" be allowed to obscure the fact that when the shires were formed in the tenth century the process was rather a spontaneous dissolution of unions previously created and a recognition of the members of such unions as peers in a new community, we shall lose sight of the real identity of the modern administrative district and the ancient tribal state. In some cases there seems to have been actual artificial division: in such instances and in the case of shires named after towns, a distinction must be made: these Mr. Freeman calls "strictly" shires as opposed to those based on the tribal divisions, which remain "strictly gauen."[2]

From what has already been said we should naturally expect to find traces of the shire long before the reign of Aelfred; and in fact the name *scir* does appear at least as early as the eighth century.[3] It has been regarded, however, as an early designation for the district answering to the hundred, which term, as already seen,[4] first appears in the laws of Eadgar.[5] But it seems not improbable that, generally, where the word

[1] *Comp. Pol.*, 418. The use of *scir* for a division of a larger whole is illustrated in Aelfred's *Baeda*, where it occurs for the diocese of a bishop. Stubbs, I, 109. The parish is also styled a "kirk shire:" Green, *Conquest of England*, 222.

[2] *Comp. Pol.*, 417–18, 124; *Norman Conquest*, I, 380, 66; Kemble, *Saxons*, I, 78 ff. Note, that both Kemble and Freeman use gá or gau and the corresponding *pagus* for völkerschaft.

[3] Ine, 36, 39; Schmid, *Gesetze*, pp. 36, 38.

[4] See Chap. V, III, (*a*).

[5] In some cases, for example in Yorkshire and Cornwall, existing hundreds are known to have been formerly called shires, and some districts still retain the name. See Stubbs, I, 98, 100, 109; Henry Adams, *Essays*, p. 19.

shire occurs before the tenth century, it may be already the new name of a völkerschaft which has been incorporated as a 'share' in a heptarchic kingdom. The fact that in several instances between the hundred and the shire an intermediate division is found, seems to corroborate this view. The *lathe* or *lest* in Kent, the *rape* in Sussex, and the *riding*[1] in Yorkshire are aggregations of hundreds below the shire.[2] Possibly, in like manner, the early *scir* was a genuine shire with hundreds below it. If this be true, it is probable that when in the tenth century the early states were mediatized and became parts of the new empire, the heptarchic shires were also mediatized and became hundreds; or, in other cases, were retained as intermediate divisions or dropped altogether.[3]

(*b*).—*The Scirgerefa and the Ealdorman.*

The English shire of the tenth century was a political and territorial division of the united kingdom. The original community of blood survived, in some instances, in the name; and the primitive religious unity of the tribe or völkerschaft was lost in that of the christianized commonwealth.

The officers of the shire were two, the *ealdorman* and the

[1] Riding, changed from *thriding* or *triding;* lathe, A. S. *laeth*, a portion of land; rape, Icel. *hreppr*, a district, the original sense probably being "share" or allotment, from *hreppa*, to catch, hence to obtain: Skeat.

[2] On these divisions see Stubbs, I, 100, 108 ff., who thinks the lathes and rapes "perhaps the original shires." Cf. Lambard, *Perambulation of Kent*, p. 18; Palgrave, *Commonwealth*, I, 101.

[3] For one of the most scholarly discussions of the origin of the shire and hundred, see Henry Adams, *Essays*, pp. 1–22. He thus summarizes his review of the documentary evidence: "The facts above cited authorize the assumption, as a general law, of the principle that the state of the seventh century became the shire of the tenth, while the shire of the seventh century became the hundred of the tenth." Page 19. See also Schmid, *Glossar*, pp. 613–14, 651; Stubbs, I, 109–111; Freeman, *Comp. Pol.*, 124, 417–419; *Norman Conquest*, I, 32, 379–81; Kemble, *Saxons*, I, 72–87; Palgrave, *Commonwealth*, I, 116 ff.; Gneist, II, 17 f.

scirgerefa or sheriff. The ealdorman represented the princeps of Tacitus and Hucbald and the satrap of Baeda; but he was also the *dux* or *herotoga;* for the early conquest of Britain was made gradually by isolated bands or tribes under the leadership of ealdormen who were undoubtedly *principes* chosen as leaders of the expeditions. Soon after the settlement of each tribe, whether the followers of Hengest or Cerdic, the invaders of East Anglia or Deira, a monarchy was set up under the most powerful ealdorman. With the process of conquest and incorporation of the smaller states, their chiefs sank into the position of vice-kings, governing under the original title of ealdorman their former districts, which now became practically, and perhaps in name also, shires. But usually several shires were administered by the same ealdorman.[1]

In historic times the ealdorman was appointed in the central witenagemot, with the king's sanction; while the scirgerefa or sheriff was nominated by the king alone.[2]

The double headship of the shire is pointed out by Stubbs as a mark of its original national character: the sheriff was the king's agent to manage his interest, especially his financial business, in the shire; and as a mark of the precedence of the central power, he was the real president or constitutive officer of the shiremoot. The ealdorman, on the other hand, represented the ancient völkerschaft, and as such sat with the sheriff in the moot to declare the customary law, and he was also the leader of the shire's contingent of the host.[3]

(*c*).—*The Scirgemot.*

The life of the shire found its center in the *scirgemot* or shiremoot, which met regularly twice a year. It was a repre-

[1] See Stubbs, *Const. Hist.*, I, 111–13, 158 ff.; Freeman, *Norman Conquest*, I, 51–2; Henry Adams, *Essays*, p. 21. Schmid, *Gesetze*, 560.

[2] Stubbs, *Const. Hist.*, I, 113. The sheriff is called scir-man in Ine, 8: Schmid, *Gesetze*, 24.

[3] Stubbs, *Const. Hist.*, I, 113.

sentative body composed of the "reeve and four best men" from each township and of all lords of land within the shire. In its functions as well as in its magistrates it possessed a double character: on the one hand it was a folcgemot, "a monument of the original independence of the population" which it represented.[1] As such it was the popular court of the district, and even possessed a vestige of legislative power, as seen at least in one instance in the reign of Aethelstan, when the freemen in full assembly formally ratified a measure of the central witenagemot.[2] As a popular court the shire-moot, in which the suitors, or a representative committee of "twelve senior thegns," were the judges, could declare folk-right in all cases, whether civil or criminal, lay or ecclesiastical: the Germanic principle of combining all classes of judicial functions in the hands of the popular assembly still prevailed. For the purpose of declaring the ecclesiastical law, but not as judge, the bishop sat side by side with the ealdorman and the sheriff in the court.

On the other hand the moot was a division court of the kingdom in which through the scirgerefa the jurisdiction of the state was enforced. In this latter capacity one function is of special interest since it still remains the most important branch of county business: the shire was employed as the higher area for the collection of the state revenue, just as the hundred was the rate district within the shire itself. The sheriff as agent of the crown got in all the royal dues whether arising from the rent or commutation for the former folc-land—the feorm-fultum; from the composition for military services; or from ship-money levied in the hundreds or wapentakes.[3]

[1] Stubbs, *Const. Hist.*, I, 116.

[2] Stubbs, *Const. Hist.*, I, 115.

[3] Stubbs, *Const. Hist.*, I, 116–17. Cf. Hallam, *Middle Ages*, II, 265 ff. Green, *The Conquest of England*, 229, insists that the original aim of the shire was "strictly financial."

(*d*).—*Comparison of the Shire System and the German Gauverfassung.*

The process by which the original sovereign states, the völkerschaften, were converted into subordinate members of the monarchy is a fact of immense significance in the history of the English race. The shire or county—at once a powerful administrative agent of the central authority and a vigorous self-governing body—is the distinguishing feature of the Anglo-American state. To it more than to the township or any other single factor must be ascribed the success which has attended the extension of representative government to the vast western empire of the United States. Historically, then, it is of considerable interest to determine whether the later development of the continental völkerschaften reveals anything analogous to that of the Anglo-Saxon tribes. In what respect, in short, did the contemporary German *gauen* or *grafschaften* differ from the old English shires?

The question has been definitely answered by Sohm in the introduction to his masterly treatise on the old German *Reichs- und Gerichtsverfassung*.[1]

In the time of Tacitus, as we have seen, the highest conception of the state, the ultimate political unit, was the tribe or völkerschaft. The stamm or congeries of tribes was at most an ethnic and religious unit. It had no political or governmental significance.

Still more shadowy and meaningless was the congeries of stämme or races, the so-called Germanic "nation." There

[1] Only the first volume of this remarkably original work has yet appeared. It bears the separate title: *Die Fränkische Reichs- und Gerichtsverfassung*, Weimar, 1871. On the *Gauverfassung* see also Waitz, *Verfassungsgeschichte*, II, 323 ff., 458 ff.; III, 319 ff.; IV, 311 ff.; Löw, *Reichs- und Territorial-Verfassung*, 126 ff.; Thudichum, *Gau- und Markverfassung*, 3–13, 80–112; Schulte, *Reichs- und Rechtsgeschichte*, 116–123, 181 ff.; Rogge, *Gerichtswesen der Germanen*, 45–46; Inama-Sternegg, *Deutsche Wirthschaftsgeschichte*, 52 ff.

may have been a latent consciousness of kinship, of community of speech and worship, which would become active on occasion of some great enterprise, as a general struggle with the Roman legions; or of some deadly and common peril, such as the invasion of Attila. But of the conception of nationality in the modern sense there was no trace.

With the Völkerwanderung an interesting phenomenon appears. The conception of the state is broadened. The stamm supersedes the tribe as the highest political unit. Instead of tribe-kingdoms we find stamm-kingdoms, such as those of the Salian Franks and the Burgundians. Instead of tribe-kings, *phylo-basileis*, we have stamm-kings with real sovereignty. Through exercise of military leadership the chieftain of the wandering race, an Amal or a Balt, becomes a monarch in the modern sense.[1] As a consequence the sovereign council of the völkerschaft disappears.[2] The monarch of the stamm is the bearer of magisterial authority.

With the rise of the Frankish empire another phase in the development of the Germanic state is reached. Under the Merovingian monarchs, and more clearly under Charles the Great, the nation supersedes the stamm as the bearer of political sovereignty. Under Clovis and his successors the stämme,

[1] "Anderseits bildet nicht mehr die *Völkerschaft*, sondern der Stamm die staatliche Einheit. In der Noth der Ereignesse, welche die in Auflösung begriffene Welt bewegten, hat die Völkerschaft ihre politische Selbständigkeit zu Gunsten der Stammesverband aufgegeben. Der fortgesetze Kriegsverband der Völkerschaften 'desselben Bluts' ist Staatsverband geworden. Der Stamm, dem noch jetzt—vielfach nach Assimilirung einer Reihe von neuen Elementen—die natürliche Einheit, Stammessprache, Stammessitte, und Stammesrecht entspricht, ist zugleich der Staat. Die Germanischen Reiche auf römischem Boden sind Stammesreiche:" Sohm, *Reichs- und Gerichtsverfassung*, 9. Inama-Sternegg, *Deutsche Wirthschaftsgeschichte*, 53. Waitz, *Verfassungsgeschichte*, II, 97–167, gives the best account of the character and functions of the Merovingian kings.

[2] Sohm, *Reichs- und Gerichtsverf.*, 278 ff. Waitz, *Verfassungsgeschichte*, II, 494 ff., agrees with Sohm for the Merovingian period; but for the Karlovingian era he thinks there may have been judicial assemblies for the whole gau: *Ib.*, IV, 313 ff.; Roth, *Feudalität und Unterthanverband*, 23–24.

in theory, ceased to be of constitutional significance; but, as a matter of fact, they were of vast political importance. Thus the great dukes of the Bavarians or of the Alamanni were stamm-chieftains; and the various divisions of the empire, such as that into Neustria and Austrasia, arose from distinctions of race.[1]

But by Charles the Great the stamm was entirely ignored. The partition of the empire among his sons was arbitrary. Peoples of the same blood were ruthlessly cut asunder by artificial division lines.[2] But the old stamm affiliations were the most deadly enemies of the empire. On the dissolution of the latter, Austrasia and Neustria again confronted one another in their original limits. "Likewise in the beginning of the tenth century arose anew the struggle between the kingdom and stamm chieftainship. The fall of Henry the Lion marks the epoch when the stamm unity—*Stammesverbindung*—definitely succumbs."[3]

The evolution of the German state, as thus far described, is of two-fold interest. On the one hand, it is precisely with respect to these later and higher stages of organic development that Teutonic institutional history differs from the Graeco-Roman. The expansion of the völkerschaft into the stamm, and of the stämme into the nation or empire finds no

[1] Sohm, *Reichs-und Gerichtsverf.*, 10; Waitz, *Verfassungsgeschichte*, II, 341–44.

[2] "Das erste Streben des aufgerichteten karolingischen Königthums ist die Beseitigung der politischen Bedeutung des Stammesverbandes. Der Sieg Karls d. Gr. über Tassilio von Baiern ist der Sieg der Reichseinheit über die Stammeseinheit. Das Stammesherzogthum hat keine Stelle in der karolingischen Reichsverfassung. Die karolingische Dynastie ignorirt ebenso die Stammeszusammengehörigkeit bei den Reichstheilungen. In dem Reichstheilungsentwurf v. J. 806 (Pertz, I, 140) zieht Karl d. Gr. eine gerade Linie mitten durch Frankreich und Deutschland, um aus dem nördlich Gelegenen ein Reich für seinen ältesten Sohn, aus dem südlich Gelegenen zwei Reiche für die Beiden jüngern Söhne zu machen. Das Reich Lothar I. schliesst später die verschiedenartigsten Bestandtheile, Italien, Burgund, Lothringen in sich:" Sohm, *Reichs- und Gerichtsverf.*, 11.

[3] Sohm, *Reichs- und Gerichtsverf.*, 11. Cf. Schulte, *Reichs- und Rechtsgeschichte*, 181–82; Roth, *Feudalität und Unterthanverband*, 26.

parallel in the ancient world. True the Roman Republic and the Roman Empire were the result of a certain kind of expansion. They were slowly built up by the double process of confederation and conquest. But until the final disruption began, the city was the *state*, the civitas. Italy was simply incorporated in the municipality, and the provinces were its subject domain.[1] Among the Greeks the polis was the highest point attained in the development of the state. The city was formed by the union of parts of phulai. But the congeries of tribes as a *whole*, the stamm—that of the Ionians for example—never gained political significance.[2] It was merely an ethnic and religious unit. Much less did the Greeks ever grasp the conception of a national union which should comprise under one sovereignty all who bore the name of Hellen and worshipped at the shrine of Zeus.

On the other hand the expansion of the Teutonic and the English monarchies seems to have proceeded on lines exactly parallel. The heretogas of the invading Jutes, Saxons, and Angles become stamm-kings with magisterial power; the Merovingian empire finds its analogue in the heptarchic kingdoms, culminating in the West Saxon hegemony; and finally under Edward, Aethelstan, or Canute we find a sovereignty which commands the obedience of a united English nation.

And the analogy does not end here. If Charles the Great ignored the stämme as political or administrative bodies, so were the heptarchic kingdoms disregarded by Aelfred and his successors; and in both Gaul and Britain the ancient völkerschaften were revived as units of the imperial administration. In England the mediatized state was called a scir; in the empire of Charles it was styled a gau or pagus.[3] In the Ger-

[1] Freeman, *Comparative Politics*, 95–99; Fiske, *American Political Ideas*, 79–85.

[2] Save perhaps temporarily in the struggle with Croesus, Cyrus, or Darius.

[3] But *gau* was sometimes used for the district occupied by a *stamm*: Sohm, *Reichs- und Gerichtsverf.*, 12. On the different uses of *gau* and *pagus*, see Waitz, *Verfassungsgeschichte*, II, 320 ff.

man gau as in the English *scir* there were two officers: the *domesticus* or *actor*, for the management of the royal domains; and the graf,[1] to collect the royal revenues arising from public dues and taxes, and to act as the king's agent in the general functions of government. In the domesticus we may find the faint analogue of the scirgerefa; but the *graf* is similar to the English ealdorman only in being placed at the head of the public administration. While the ealdorman is elected in the witenagemot, though subject to the royal confirmation, and represents the dux or princeps of a once sovereign state, the graf like the domesticus is the nominee and servant of the king. Moreover when, in the Karolingian period, he absorbs the functions of the domesticus[2] and supersedes the ancient thunginus or centenarius as president of the hundred court, his office bears a striking resemblance to that of the Anglo-Norman vicecomes after the ealdormanship had become extinct.[3]

In the Gothic kingdoms the gau appears as *civitas*, *pagus*, or *provincia*. The graf and domesticus are represented respectively by the *comes civitatis* and the *comes patrimonii*, who perform the same duties and bear the same relation to the monarch as the corresponding Frankish officials.[4]

Among the Lombards the analogous administrative unit is the *civitas* or municipal district;[5] and in this instance

[1] The gau was therefore called also *Grafschaft*: Sohm, *Reichs- und Gerichtsverf.*, 17. The word *Graf* means "servant" and in sense is the equivalent of the Anglo-Saxon *gerefa*: *Ib.*, 19.

[2] The office of graf was sometimes conferred on a slave: Sohm, *Reichs- und Gerichtsverf.*, 21, 23. After the close of the Merovingian era the offices of domesticus and graf, though theoretically distinct, were regularly conferred upon one person with title of graf: *Ib.*, pp. 16, 17. On the whole subject of graf and domesticus see *Ib.*, 13–22.

[3] Under the Karolings the graf became the president of the hundred court, and the centenarius or vicar, the analogue of the sacebaro of the Salian code, was usually appointed by him as a mere executive functionary: Sohm, *Reichs- und Gerichtsverf.*, 146–181, 74–101.

[4] Sohm, *Reichs- und Gerichtsverf.*, 22–23.

[5] *Stadtgebiet:* Sohm, *Reichs- und Gerichtsverf.*, 24.

there is a remarkable approximation to the dual organization of the English shire. The scirgerefa appears as the *gastalde* who superintends the royal domains; and the ealdorman is replaced by the *dux*, who, though appointed by the crown, is no mere royal servant, but a national magistrate representing the surviving sovereignty of a once independent völkerschaft; and who can only be deposed from his office by judicial process.[1]

But in one respect and that of the first importance the organization of the English shire is unique. The scirgemot with its half sovereign attributes is the peculiar possession of the English race. Neither the Frankish gau nor the Lombard civitas had a popular council, the only local assembly being that of the hundertschaft.[2] In other words the gau was not a self-governing local organism: it was merely an administrative agent of the central power.

IV.—The Norman County.

(*a*).—*The County at the Mercy of the Sheriff.*

The first and general result of the Conquest was the drawing of the shire into a closer dependence upon the crown and

[1] "Der dux und der Ealdorman sind Vicekönige mit einer dem König gegenüber *selbständigen* Gewalt. Nicht die Willkür des Königs, sondern ein Satz der öffentlichen Verfassung bestimmt die Amtsvollmacht des langobardischen und angelsächsischen Herzogs. Nicht die Willkür des Königs, nur gerichtliches Urtheil vermag den dux und Ealdorman seiner Stellung zu entkleiden:" Sohm, *Reichs- und Gerichtsverf.*, 25.

[2] This point as against earlier writers is established by Sohm, *Reichs- und Gerichtsverf.*, 278–297. Compare Waitz, *Verfassungsgeschichte*, II, 494 ff., IV, 312–313, who, while agreeing with Sohm as to the Merovingian period, maintains that the judicial assembly of the Karolingian period was a *Gauversammlung* under presidency of the graf. See also Rogge, *Gerichtswesen der Germanen*, 45–46, 51; Palgrave, *Commonwealth*, I, chap. III; Stubbs, *Const. Hist.*, I, 116; Inama-Sternegg, *Deutsche Wirthschaftsgeschichte*, 57; Thudichum, *Gau- und Markverfassung*, 80–82. On the graf as judge see Fustel de Coulanges, *Recherches sur Quelques Problèmes d'Histoire*, 403 ff.

the introduction of new names. Side by side with the Anglo-Saxon *scir* appeared the Norman term *countè*, county,[1] and the scirgemot became the county court. The functions of the scirgerefa were transferred to the *vicecomes* or viscount; but the ancient English title was still used by the people, and soon thrust aside, save in official documents, the foreign interloper altogether.[2]

The Norman sheriff was in a peculiar sense a royal agent and he ruled the county with an iron hand. His power, particularly in fiscal matters, was very great, and his office even showed a tendency to become hereditary, as it had been in Normandy;[3] but this was not permanently effected, and though the people strove to gain the right of appointment, throughout the whole of English history he has remained an appointed lieutenant of the crown.[4] The sheriff was still the constitutive officer of the county court; but the ealdorman no longer sat with him as the people's representative,[5] and the bishop, likewise, soon ceased to appear as an expounder of the canon law;[6] for spiritual causes were transferred to special ecclesiastical tribunals. Thus early did the differentiation in functions begin.

The shire court existed throughout the Conqueror's reign and that of Rufus, but it seems to have been employed chiefly as a means of extortion, severe fines being imposed for non-attendance of suitors. It had in fact ceased to be a free

[1] *County*, countè, O. F. *conte*, count, from *comes:* Skeat, at "count." The official Latin term for county was *comitatus*.

[2] Gneist, II, 25.

[3] Stubbs, *Const. Hist.*, I, 272.

[4] Gneist, II, 26. On the history of the appointment of sheriff see Stubbs, *Const. Hist.*, II, 206–8.

[5] The ealdorman had been superseded by the earl and ceased to sit in the shiremoot before the Conquest. See Smith, *Hist. Eng. Inst.*, 75; Stubbs, *Const. Hist.*, I, 160.

[6] The act by which William separated the spiritual and lay jurisdictions is found in *Select Charters*, p. 85, and Thorpe, *Anc. Laws*, I, 495. The date is not given: Stubbs, *Const. Hist.*, I, 277, 283.

assembly and had become merely a fiscal machine of the crown.

But a charter of Henry I issued between the years 1108 and 1112 marks an epoch of revival. By this it was provided that both the hundred and shire courts should be held "as in the time of King Edward and not otherwise."[1] From this period the court was held twice a year and the suitors were still, in theory, the "reeve and four" with the parish priest from each township and all lords of land: vicars, earls, bishops, hundredmen, bailiffs, barons, vavassors; only villeins and other inferior men being excluded.[2] In practice, however, the attendance was probably limited to those suitors who had a voice as judges or jurors: possibly such were the *judices* and *juratores* of the laws of Henry I.[3] Besides this limitation the attendance was further decreased by the exemption of lords with grants of criminal jurisdiction, those who had compounded for non-attendance, and all tenants *in capite*.[4]

The shire court still possessed both civil and criminal jurisdiction; but the former was greatly restricted by the royal writs of *praecipe* by which suits relating to land or the debts of laymen could be arbitrarily taken, in the first instance, before the curia regis; and the latter, by the practice of requiring the sheriff to record the graver criminal cases, comprised under the head of "pleas of the crown," for the view of the king's justices in their provincial visitations. Both of these practices were known in the later Saxon period, but had not become customary.[5]

[1] Stubbs, *Select Charters*, 103–4; *Const. Hist.*, I, 394.

[2] Bigelow, *History of Procedure in England*, 132–3; Stubbs, *Const. Hist.*, I, 394; *Leges Hen. I*, VII, 1, 2, 6: Schmid, *Gesetze*, 440; *Select Charters*, 104–5.

[3] Bigelow, *Hist. of Procedure in Eng.*, 134–5; Stubbs, *Const. Hist.*, I, 396–7; *Leges Hen. I*, 29: Schmid, *Gesetze*, 449; *Pipe Roll H. I.*, pp. 27–28.

[4] Bigelow, *Hist. of Procedure in Eng.*, 133–4; Stubbs, *Const. Hist.*, I, 397.

[5] Stubbs, *Const. Hist.*, I, 187, 394.

(*b*).—*The National and the Local Organisms meet in the County Court.*

A new era began when the jurisdiction of the crown—for the good of the nation ever increasing, though by encroachment upon the local tribunals—was systematically administered in the county courts by the itinerant justices. This stage was reached in the reign of Henry II; and from this time the court met in two forms or sessions: the *plenus comitatus* or "full session" called to meet the national judges, and the ordinary session held by the sheriff. From attendance upon the former there was no exemption—even the most powerful lords of franchises must pay suit and service to the royal justices. It was here in the formation of juries for assizes and appraisements that the principle of representation received a mighty impulse. The full session was "still the folkmoot" and contained "thus all the elements of a local parliament—all the members of the body politic in as full representation as the three estates afterwards enjoyed in the general parliament."[1]

The ordinary session, according to a law of Henry III, 1217, was to be held not oftener than once a month.[2] By the Provisions of Westminster, 1259, and the Statute of Marlborough, 1267, all "magnates"—those above simple freemen—were excused from attendance; and by the Statute of Merton, 1236, even the latter could appear by attorney, or if suitors of the franchise courts, they could secure entire exemption by money composition.[3] Thus the influence of the ordinary county court waned; and its importance was further diminished by the clause of magna charta prohibiting the private and other local courts from determining pleas of the

[1] Stubbs, *Const. Hist.*, II, 205.

[2] The duty of attendance seems to have been felt as a severe burden, and the sheriff sought to increase the number of meetings for the sake of the fines for non-attendance.

[3] Stubbs, *Const. Hist.*, II, 205, 52.

crown: the latter embracing not only graver crimes such as murder, but also minor offences such as housebreaking and assault.[1] But this was in part balanced by abolition of the abuse of writs of *praecipe*.[2]

Notwithstanding all drawbacks, in the age of Edward I the county was still a living, self-governing body and its court was the chief point of contact between the central and local jurisdictions. Bishop Stubbs arranges the business of the court under six heads: 1. The judicial work of the body in both ordinary and full sessions. 2. The conservation of the peace. All writs directing the keeping of watch and ward, taking the oath, and the pursuit of malefactors were proclaimed in full county court. Here also were elected the coroner and the early custodians and conservators of the peace. 3. Military functions. The county was the unit of the national militia organization, the minor tenants in chief and the mass of freemen sworn under the assize of arms being commanded by the sheriff: and sometimes even the feudal array of barons was placed under his direction by the king. "In every change of military organization, and there were several such changes in the course of the thirteenth century, the sheriff retains his place."[3] 4. The execution of remedial measures. Complaints of evil customs and demands of redress were made in Parliament by knights elected in the county court; and, in like manner, parliamentary measures enacted in respect to such demands were executed by juries chosen by the same body. 5. The fiscal business, the most important function of the shire. All taxes of whatever description were usually assessed

[1] *Magna Charta*, c. 24: Thompson, *Magna Charta*, 203 ff.; Glanville, I, 2: Phillips, *Eng. Reichs- und Rechtsgeschichte*, II, 337; Creasy, *Eng. Const.*, 127; Stephen, *Hist. of Crim. Law*, I, 82 ff.; Blackstone, *Commentaries*, III, 40; IV, 1, 424; Stubbs, *Const. Hist.*, I, 187, 382–3.

[2] *Magna Charta*, c. 34: Thompson, *Magna Charta*, 215; Creasy, *Eng. Const.*, 133; Reeves, *Hist. of Eng. Law*, II, 44; Smith, *Hist. Eng. Inst.*, 81; Blackstone, *Commentaries*, III, 274, 195.

[3] *Const. Hist.*, II, 210.

and collected by juries elected in the county court, or occasionally in the hundred; and a remarkable proof of the former national character of the county is found in the fact that in this period, not only the assessment and collection of the state revenue, but sometimes even the right to vote or grant the same, was claimed and enforced as the prerogative of each individual shire.[1] 6. The right of the county as a body politic to approach the crown by petition or otherwise through the sheriff or elected representatives[2]—a right which still survives in the power of the grand jury to make presentments before the royal judges on matters of local concern.[3]

V.—The Modern English County: Dissolution of the County Court.

The Norman county as a form of local government reached its highest point of development in the age of Edward I; but the seeds of decay were already planted. The sheriff was no longer the all-powerful royal governor with the vast jurisdiction possessed during the earlier reigns; and the elective office of coroner, which appeared as early as 1194, seems to have been designed at once as check and complement to the police and judicial powers of the king's nominee.

Furthermore a new institution, the creation of royal authority, was about to supersede the county court in many of its surviving functions. This was the office of justice of the peace, the full development of which in the age of Edward III, marks the most important epoch in the history of the county. From this time onward the shire found a new center in the quarter sessions, to which court, in conjunction with the other tribunals of the justices, not only the peace jurisdiction,

[1] Stubbs, *Const. Hist.*, II, 214–15.

[2] On the whole subject see Stubbs, *Const. Hist.*, II, 215–16.

[3] Chalmers, *Local Government*, 92.

but also a vast portion of the ever increasing administrative business of the county, was transferred.

The quarter sessions likewise more than recovered the criminal jurisdiction which the ancient county court had lost. And this function became eventually the source of frequent abuse.[1] But it is important to note that, though the old shire court fell into decay, it did not entirely perish; its ancient organization as a folkmoot was still preserved for the election of coroners, verderers, and knights of the shire. Thus the county had two centers: the old scirgemot, the meeting of the volk, with decaying functions; and the new justices' courts, branches of the royal jurisdiction, whose powers and range of duties were constantly expanding. Finally, it is of particular importance to notice in passing that it was the new institution, and not the old, which became the model for the county courts of the American colonies.

With the advent of the quarter sessions two new county officials make their appearance:[2] the *custos rotulorum*, or keeper of the records—the analogue of the royal keeper of the rolls; and the "clerk of the peace,"[3] the prototype of the American county clerk. The custos is the principal justice of the peace and heads the list of names in the commission. The office is usually conferred upon a peer;[4] and the actual duties of the post are performed by the clerk of the peace who is nominated by the custos and for whose acts the latter is responsible.

The sheriff had already lost his ordinary criminal jurisdiction through magna charta and his ordinary civil jurisdiction through the development of the national courts. He now

[1] See Stephen, *Hist. Crim. Law*, I, 114 f.; Smith, *Hist. Eng. Inst.*, p. 108; Blackstone, *Commentaries*, IV, 282 ff.

[2] Gneist, II, 190; Chalmers, *Local Government*, 93.

[3] Known also in early times as *attornatus domini regis*, "clerk of the crown," "clerk of the justices": Gneist, II, 192.

[4] Gneist, II, 190–2; Chalmers, *Local Government*, 94.

loses his police jurisdiction through the justices of the peace; and is soon destined to surrender his military authority to the lord lieutenant.[1]

The latter office was created by Henry VIII in 1545 and it is of peculiar interest on account of its history in the American colonies. It was a revival of the office of the ancient ealdorman: for the lord lieutenant, and not the sheriff, was commander of the host. Thus the continuity in functions of the ancient tribe chief and the princeps was maintained.[2] But the office had never entirely expired. From time to time the crown had always exercised the right to appoint "commissioners of array," other than the sheriff, to command the military contingent of the shire.[3]

The lord lieutenant is appointed by special commission of the crown; and until 1871 ranked as "the first military officer of the county;" and since the office of *custos rotulorum* is usually conferred upon him, he is still second only to the sheriff as its civil head.[4] The latter retains the ancient right to call out the force of the county in case of sudden emergency; but the *posse comitatus* headed by the sheriff exists only in name. In 1871 the militia jurisdiction of the lord lieutenant was taken away and revested in the crown.[5]

Besides those already enumerated, the officers of the modern county are the surveyor, the county police, and the county analyst, the latter appointed by the quarter sessions under the acts for the "sale of food and drugs."[6] There is also a county treasurer appointed by the justices in quarter sessions, whose chief duty is the collection of the county rate and the custody

[1] For this see Gneist, II, 25; cf. Stephen, *Hist. Crim. Law*, I, 77–85, for the decay of the sheriff's jurisdiction. Reeves, *Hist. of Eng. Law*, II, 45.

[2] Hallam, *Const. Hist.*, II, 133; Chalmers, *Local Government*, 93.

[3] Gneist, II, 55.

[4] Gneist, II, 57.

[5] Chalmers, *Local Government*, 92–3.

[6] Chalmers, *Local Government*, 100.

of the county funds. This officer has existed at least from the reign of Elizabeth.[1]

Modern legislation has nearly completed the dissolution of the ancient shire. Its boundary lines have been ruthlessly cut and intersected by the innumerable artificial districts created for administrative purposes.[2] Even the territorial jurisdictions of the "new county courts" created in 1846 have no respect for the old county lines.[3] From this date there have been two tribunals bearing the name of "county court." The younger court has deprived the elder of the last vestige of its jurisdiction in civil causes; but it has no practical connection with the county.[4]

The jury for centuries has superseded the collective freemen as judges. The justices, the guardians of the poor, and other boards, have absorbed the greater portion of the administrative business. The old county court possesses but a remnant of its original powers. Here the coroner is still elected, outlawry may be proclaimed, and in theory it is still the duty of the sheriff to publish in the county court all acts passed by the legislature.[5] Until recently an important feature of its primitive character as a folcgemot was preserved in the open election of members of Parliament in full court, held by the sheriff as returning officer; but since the introduction of the

[1] Gneist (1871), pp. 121, 374–5. But it seems to have been introduced gradually. Thus in Devon the treasurer first appears as a permanent officer in the reign of Charles I. Hamilton, *Quarter Sessions*, 114.

[2] See Chalmers, *Local Government*, pp. 17 ff.

[3] Gneist, II, 159–63; Smith, *Hist. Eng. Inst.*, 104–5; Maitland, *Justice and Police*, 23 ff.; Chalmers, *Local Government*, 92.

[4] But the new courts, in theory, are branches of the old county court held by the sheriff. Gneist, II, 159; Maitland, *Justice and Police*, 22; Smith, *Hist. Eng. Inst.*, 105–6.

[5] Chalmers, *Local Government*, 92. On the modern English county see the excellent essay of Brodrick, *Local Government in England* in the Cobden Club volume on *Local Govt. and Taxation*, pp. 5 ff.; also Acland, *County Boards*, in *Ib.* 89 ff.

ballot and the division of the county into polling districts, even this has become a "shadow."[1]

The prominent characteristic of the present county is its centralization—its dependence upon the crown; all its officers, save the coroner, are royal nominees; and in this respect English county government presents a striking contrast to the democratic elective system prevailing in the United States.[2]

[1] Cf. Maitland, *Justice and Police*, 22.

[2] It should be remembered that however popular may be the government of the parish or union, these have nothing to do with the county as such; and, granting that the county justices and the other officers are practically the people's representatives, such as would be selected if the elective principle prevailed, still the county is little more than an imperial administrative district.

On the similarity of the English to the Hungarian county, see Goldsmid, *Journal Brit. Arch. Association*, 1872, pp. 241 ff.

CHAPTER VII.

RISE OF THE COUNTY IN THE NEW ENGLAND COLONIES.

I.—Origin in Various Jurisdictions.

In New England, as already seen, the local center of political life was the town-meeting, and, naturally, historians have found the latter a subject of absorbing interest. But from an institutional point of view it would seem that in fixing the attention too closely upon the action of the town communities, scant justice has been done to other members of the local organism. The county system of New England, more particularly of Massachusetts, has received nothing like the attention which it deserves, whether as compared with the township or with the contemporary shire organization of the mother country.

Not until a number of years after the settlement of each colony was the shire introduced. So long as the assistants or the general court were able to discharge the functions of a higher judiciary for all important causes, and the colonial marshals could execute their processes, town government sufficed; but with the increase of population, the extension of settlements, and the vast expansion in the volume of business, arose an imperative demand for a district between the province and the isolated communities.

Thus in 1665, after the union of the New Haven and Hartford jurisdictions, county courts were first instituted in

Connecticut;[1] and in the following year the extent of the four counties was definitely defined.[2] The county court, as gradually developed by various acts, consisted of several of the town "commissioners" or county justices of the peace and one or more magistrates appointed by the general assembly.[3] Its jurisdiction extended to all criminal actions "except those of life, limb, or banishment," and to all civil causes, those for more than twenty shillings being tried by a jury. Appeal lay to the supreme court consisting of eight magistrates at least.[4]

Only in 1703 were the first two counties in Rhode Island incorporated each with a court of common pleas.[5] But already in 1729 increase of population rendered reorganization necessary, and the whole colony was divided into three new counties.[6] The judiciary was also remodelled, each county having two courts similar to those existing elsewhere in the colonies during the same period: the "general sessions of the peace" for criminal actions held by the county justices; and the "court of common pleas" for civil cases held by four judges appointed by the assembly.[7]

[1] *Conn. Col. Rec.*, II, 25: To be held by not less than two "Assistants" with two or more "Commissioners" (equivalent to town justices of the peace), "to y^e^ number of fiue judges at least." Cf. Trumbull, *Hist. of Conn.*, I, 276–7; Hildreth, I, 462. Later, justices of the peace for each county were commissioned by the general court: *Conn. Col. Rec.*, 1689–1706, pp. 235, 324, 376.

[2] *Conn. Col. Rec.*, II, 35; Trumbull, *Hist. of Conn.*, I, 316; Johnston, *Connecticut*, 189–190.

[3] *Conn. Col. Rec.*, 1689–1706, pp. 235–6, 357–8; Trumbull, *Hist. of Conn.*, I, 277, 316.

[4] Trumbull, *Hist. of Conn.*, I, 277. For various acts see *Conn. Col. Rec.*, 1689–1706, pp. 268, 324, 376, etc. On New Haven county before the union see the two volumes of *Colonial Records* and Bacon's *Civil Govt. in New Haven*, in *New Haven Hist. Soc. Papers*, I, 11–27; Levermore, 36 ff.

[5] Green, *Short Hist. of R. I.*, 341–2; Hildreth, II, 254; Arnold, *Hist. of R. I.*, II, 12–13.

[6] *R. I. Col. Rec.*, IV, 427–8; *Public Laws*, 1730, p. 188; Hildreth, II, 313; Arnold, II, 97–8; Durfee, *Gleanings*, 15.

[7] The four judges were in fact chosen from county justices of the peace—

In like manner the Plymouth jurisdiction was, at a late period,[1] divided into three counties, each with a court held by assistants and associates; the latter being originally appointed by the general court, but subsequently elected by the people in the several shires.[2]

In all these colonies, especially in Rhode Island and Plymouth, the county seems to have had comparatively little significance save as a judicial district; though in Connecticut it was also the higher military unit: the train-bands of the different towns in each being formed into a regiment under an elected sergeant major.[3]

But whatever may be said as to the importance of county organization elsewhere in New England, there is little ground for the difficulty which some writers seem to find in comprehending the *raison d'être* of the Massachusetts shire.[4] The history of the latter as an institution is only second in interest to that of the township. It was a most active and useful organism being employed for at least four important purposes: as a judicial district, an area for rating and equalization of

the two courts being held by the same men: Durfee, *Gleanings*, 31. The development of the judicial system of Rhode Island, from the period of the four "isolated states" onward, affords a remarkable example of institutional evolution. See Vol. I of *Rhode Island Col. Records*, Vol. I of Arnold, and especially Judge Durfee's admirable *Gleanings from the Judicial History of Rhode Island*, just cited. It constitutes No. 18 of the *R. I. Hist. Tracts.*

[1] In 1685, before which date the town selectmen were the only tribunals below the court of assistants: 3 *Mass. Hist. Coll.*, II, 267; Barber, *Hist. Coll. of Mass.*, 493.

[2] *Plym. Col. Rec.*, VI, 193–4, 247, 267.

[3] *Conn. Col. Rec.*, 1678–89, pp. 61–3; 1689–1706, pp. 226, 462, 465. See especially the letter of John Allyn to Gov. Andros, Oct. 15, 1688, in *Ib.*, 1678–89, pp. 450–1.

[4] The following sketch of New England county government is based mainly on the original Colonial Records, the Province Laws, and certain county court records of Massachusetts. Hence it has seemed best to offer in advance the preceding synopsis of leading facts relating to the origin of the county in the other New England colonies.

assessments, a higher military unit, and as a factor in the system of official nominations.

II.—Evolution of the Shire Courts.

(*a*).—*The Quarter Courts.*

The judicial business of the shire has always been its chief function and it was the first for which it was employed in Massachusetts. Previous to 1636 the entire judicial work of the colony had been discharged by the general court and the court of assistants.[1] But in that year it was ordered that "the governor and the rest of the magistrates" should hold four great quarter courts yearly at Boston.[2] These courts had both civil and criminal jurisdiction in all causes, with appeal to the general court whose regular meetings were now reduced to two each year.[3] At the same time inferior tribunals, called "quarter courts," in distinction from the "great quarter courts" just mentioned, were erected.

It was ordered "that four courts should be kept every quarter: 1, at Ipswich, to which Newberry shall belong; 2, at Salem, to which Saugus shall belong; 3, at New Town, to which Charlestown, Concord, Medford, and Watertown shall belong; 4, at Boston, to which Roxbury, Dorchester, Weymouth, and Hingham shall belong." Each of these courts was held by a magistrate dwelling near the court town, specially designated for the purpose by the general court,[4]

[1] From 1629 onward to 1634, when deputies were first returned, the general court was composed of the governor, deputy governor, treasurer, assistants, and freemen, meeting according to the charter four times a year; whereas the court of assistants was to meet monthly. Thereafter the freemen only appeared at the "General Court of Election," not at the legislative session.

[2] *Mass. Col. Rec.*, I, 169.

[3] *Mass. Col. Rec.*, I, 169–70.

[4] "Soe as noe Court shalbe kept without one magistrate att the least, & that none of the magistrates be excluded, whoe can & will intend the same;

together with four associates—"persons of worth"—appointed also by the general court, but from a greater number nominated by the several towns. Their jurisdiction extended to all civil cases involving not more than ten pounds, and all criminal causes "not concerneing life, member, or banishment." Appeal lay to the great quarter courts.[1]

In 1638 still lower tribunals for the "ending of small causes involving not to exceed 20 shillings were established. These were held either by a single magistrate, or, in towns where no magistrate dwelt, by three commissioners appointed by the general court, any two of whom were authorized to act. Appeal lay to the "quarter courts" or "court of assistants."[2]

The Records of a Quarter Court.

The four quarter courts established in 1636[3] are especially interesting as being the germs of the later "county courts;"[4] and the original records of their proceedings, still in part preserved, demonstrate that their functions were essentially the same in character as those of the quarter sessions created under the second charter. Thus, in addition to the judicial work proper, these early tribunals like the later were entrusted with the performance of a certain amount of general executive and administrative business. Their records are in consequence exceedingly instructive, throwing many a powerful side-light on the social condition and moral sentiments of the age, and thus furnishing a unique and invaluable complement to the town records themselves. Not least among

yet the Geñall Court shall appoynct w^{ch} of the magistrates shall specially belonge to eūy of saide Court." *Mass. Col. Rec.*, I, 169.

[1] *Mass. Col. Rec.*, I, 169.

[2] *Mass. Col. Rec.*, I, 239.

[3] Washburn, *Judicial Hist. of Mass.*, 30, states, erroneously, that these courts were created in 1639.

[4] The quarter courts are styled "county courts" in the margin of the *Mass. Col. Rec.*, I, 169.

the many important services rendered to the historical student by the Essex Institute has been the printing of the court records of Essex county for the years 1636–1641.[1]

The minutes of each session are usually introduced by an entry of the names of the magistrates and commissioners present. The latter, if newly appointed, then take the oath of office which runs as follows:

"You doe heere take God to witness and doe sweare by his name that in all causes or controversies that shall come before yo^{r} you will in God's feare use yo^{r} best skill & abilitye dilligentlie to search out & rightlie to iudge wthout ptiallitie, betweene cause and cause & ptie & ptie according to the testimonie & euidence that is brought before yow. so help yo^{r} God."[2]

Then follows ordinarily a record of such business as could be transacted by the court without a jury; such as the remission of penalties;[3] the imposition of fines for absence at court or from the jury,[4] for taking excessive wages,[5] or for petty breaches of the peace; and the passing of orders relating to the civil administration of the shire. Finally, the minutes of each session usually conclude with the names of the jurors and a record of the causes in process of litigation.

As already intimated these courts seem to have possessed the germs of the later extensive civil and police administration of the county courts. Thus the Salem tribunal passed orders relating to the repair and construction of fences;[6] the direction of the town watch, and the viewing of boats.[7] It also acted

[1] In *Hist. Collections of the Essex Institute*, vols. VII, VIII, communicated by A. C. Goodell.

[2] *Hist. Coll. Essex Inst.*, VII, 17, 19.

[3] *Hist. Coll. Essex Inst.*, VII, 89; VIII, 191.

[4] *Hist. Coll. Essex Inst.*, VII, 19, 87, 186.

[5] *Hist. Coll. Essex Inst.*, VII, 87.

[6] *Hist. Coll. Essex Inst.*, VIII, 126, 128, 190.

[7] *Hist. Coll. Essex Inst.*, VII, 19. "It was ordered and agreed, for this Towne of Salem, viz: That all the Canooes of the North syde of the Towne

as a court of probate and administration.[1] And, according to Washburn,[2] these tribunals were authorized to lay out highways, license houses of entertainment, provide for the support of an able ministry, and admit persons as freemen of the colony.

Various forms of corporal punishment, some of them rather peculiar, were imposed for petty offences. Exposure in the stocks, especially on training-days, was of frequent occurrence;[3] and at nearly every session, persons were condemned to be publicly whipped by the constable, run-away apprentices being particularly unlucky in this regard.[4] Indeed apprentices furnished the court with constant employment. For "being overseen in drink"—a frequent offence—they were punished by fines recoverable from their masters, the latter, as indemnity, being entitled to an extension of the time

shal be brought the next second day, being the 4th day of the ffifth moneth 1636 about nine of the Clock in the morning, vnto the Cove of the common landing-place of the North River, by George Harris his howse. And that all the Canooes of the South syde, are to be brought before the store house in the South River att the same tyme. then and there to be viewed by John Holgrave, Peter Palfrey, Rich[h] Waterman Roger Connant, & Phillip Verrin or the greater number of them. And that there shalbe noe Canooe used (upon the penaltie of ffortie shilling to the owner thereof) than such as the said surveiors shall allowe of and sett their marke upon, and if any shall refuse or neglect, to bring their Canooes to the said places att the tyme appointed shall pay for the said faulte or neglect tenn shillings."

"It is ordered Concerning the Watch at Salem. That all the watchmen warned, shall meete y[e] Constable att the meeting house half an hower after sunsett, there to receiue their chardge and not to depart in the morning untill they haue beene w[th] the next Constable to be dischardged, upon penaltie of five shillings."

These extracts are from the record of the first "quarter Court in Salem the 27th of 4 moneth 1636," and they reveal the interesting fact that the court transacted business for Salem, ordinarily performed by the town-meeting. The requirement that "canooes" be viewed and marked may however be the germ of the later jurisdiction of the county court over ferries.

[1] *Hist. Coll. Essex Inst.*, VII, 275–6.

[2] Washburn, *Judicial Hist. of Mass.*, 32.

[3] See examples in *Hist. Coll. Essex Inst.*, VII, 185–186, 188.

[4] *Hist. Coll. Essex Inst.*, VII, 87, 129, 130, 186, 187, 188, 276, 278.

of service.[1] But there were other forms of punishment essentially puritan in character. Many such entries as the following occur in these records:

"Geo: Dill fined 40^{s} for drunkenes, & to stand att the meeting hous doar next Lecture Day, wth a Clefte stick vpon his Tong, & a pap[er] vpon his hatt subscribed for gross p^{r}meditated Lying. he offers m^{r} Humphreys for security for his fine of 40^{s}."[2]

In March 1638 Mr. Burrell and John Legg for "uncleanes" were condemned to sit in the stocks on training day, and the latter was required in addition to "acknowledge (on the Lords day after the church meeting, & blessing pnouced) & freely confesse his sinn for Publik satisfaction."[3]

One is surprised to learn from these records that "husband-beating" was painfully frequent among the "good-wives" of Salem; but in this respect, at least, the sexes "enjoyed" equal rights before the law. For example in 1637, at the fifth quarter court, it was decreed:

"Wheras Dorethy the wyfe of John Talbie hath not only broak that peace & Loue, w^{ch} ought to haue beene both betwixt them, but also hath violentlie broke the kings peace, by frequent Laying hands vpon hir husband to the danger of his Life, & Contemned Authority, not com̄ing before them vpon command, It is therefore ordered that for hir misdemeaner passed & for p^{r}vention of future evills that are feared wilbe com̄itted by hir if shee be Lefte att hir Libertie. That she shall be bound & chained to some post where shee shall be restrained of hir libertye to goe abroad or comminge to hir husband till shee manefest some change of hir course and Conversation & repentance for what is already com̄itted.

[1] *Hist. Coll. Essex Inst.*, VII, 87, 132. Fines for theft were discharged in a similar way: *Ib.*, VIII, 189; and, likewise, for defaming or running away from their masters, apprentices were condemned to longer service: *Ib.*, VII, 187; VIII, 123.

[2] *Hist. Coll. Essex Inst.*, VII, 239. Cf. *Ib.*, 240, 275.

[3] *Hist. Coll. Essex Inst.*, VII, 185.

Only it is pmitted that she shall come to the place of gods worshipp, to enjoy his ordenances."[1]

"Dorethy" seems, however, to have continued in her "course," for in 1638 she "was sentensed to be seuerly whipped for missdemanour ageanst hir husband;"[2] and in 1641 the same punishment was meted out to Goody Brown "for breking her husbands head & thretn°d y^t she wold kill him, so y^t her husband is euen weary of his life."[3]

The following remarkable decree not only furnishes an example of condemnation to service for debt, but also proves that the worthy commissioners were not greatly hampered in the dispensation of justice by the niceties of legal classification:

"Joseph Garlick convented for drunkenes for w^ch the Court fined him fforty shillings, also wheras he was Indebted vnto m^r Moses Maverick the some of Three pounds & m^r Holgraue the some of fifteene shillings. The sd Garlik is to serue the sd Maverick Twelue months for the vallue of Twelue pounds. And the sd Maverick is to see the sd fine of 40^s & 15^s p m^r Holgraue pd w^thin sixe months."[4]

(*b.*)—*The County Courts.*

In May 1643 the jurisdiction of Massachusetts was divided into four "sheires:" Essex, Middlesex, Suffolk, and Norfolk;[5] but this was little more than a formal recognition of what had already existed in fact. The territorial jurisdictions of the shires corresponded roughly with those of the four "quarter courts;"[6] and the judicial system of the county was already practically complete. The county courts or shire courts, as the

[1] *Hist. Coll. Essex Inst.*, VII, 129.
[2] *Hist. Coll. Essex Inst.*, VII, 187.
[3] *Hist. Coll. Essex Inst.*, VIII, 126.
[4] *Hist. Coll. Essex Inst.*, VII, 277.
[5] *Mass. Col. Rec.*, II, 38.
[6] Suffolk included nearly the same territory as the jurisdiction of court No. 4 of 1636; and Middlesex included that of No. 3. See Channing, p. 34–5.

quarter courts were henceforth called, were constituted much as were the latter bodies.[1] But the "associates" who sat with the magistrate were elected by popular ballot, two for each shire. This change was first effected by an order of the general court in 1650, the alleged object being to put an end to "soundry inconveniencjes" caused by the "suddajne and vnexpected adjournement of Shiere Courts."[2] This act was suspended as respects Suffolk and Middlesex in the following year.[3] It was expected that the nomination of associates should be approved by the general court; but this was sometimes neglected, as appears from the preamble of an act of 1674. By this act it was provided that four[4] associates should be elected in a manner similar to that prescribed in 1650, who should be certified yearly to the general court of election for confirmation, and thereafter required to take the oath of office in the county court.[5] The associates at the time

[1] But they could now try all civil causes save divorce cases: Washburn, *Judicial Hist. of Mass.*, 31.

[2] "... Itt is ordered ... that annually, vppon the day of nomination of men for magistrates in euery toune, there shall also be a chojce of some meete persons for associates for each shiere, chosen by papers and pervsed in each toune meeting, and those two that have most votes shallbe signifjed vnder the counstables hand, and deliuered vnto each person designed to carry the votes for magistrates vnto their shiere meeting, who, so mett together, shall examine the votes of the seuerall tounes, and those two that have most votes shall be signifjed vnder their hands, and presented vnto some magistrate in each shiere, or to their next Shiere Court, by the counstables in the towne where they dwell, to take their oath according to lawe, which sajd associates for each shiere ... with one magistrate, shall henceforth duely attend, and keepe all and euery the sajd Shiere Courts, ... that so there be no occasion of complajnts of that nature in time to come." *Mass. Col. Rec.*, IV, Part I, pp. 27–8; cf. *Ib.*, III, 211.

[3] *Mass. Col. Rec.*, III, 222; IV, Part I, p. 38. Suffolk containing Boston, and Middlesex containing Charlestown and Cambridge seem to have been placed more directly under the control of the general court than the other shires.

[4] But the number varied in practice. *Mass. Col. Rec.*, V, p. 5 (3 for Norfolk), p. 31.

[5] *Mass. Col. Rec.*, V, pp. 3–4. For examples of confirmation see *Mass. Col. Rec.*, IV, Part II, 301; IV, Part I, 133, 180; V, 5, 31, 145, 226, 485, 279.

of confirmation were often granted "magistratical" authority, each for a particular town within the shire where no magistrate resided. To such a commission was granted similar to that of an English justice, in which was "incerted the preservation of the peace, taking recognizances and binding ouer offend^rs to the county court to which they belong, punishing all offences whose poenalty is stated by law vnder forty shillings or corporall punishment not exceeding tenn stripes, . . . taking depositions, joyning persons in marriage," and "ending small causes" not exceeding forty shillings.[1] The number of magistrates appointed to "keep the county court" with the associates varied from one to three or more;[2] and they were sometimes designated for particular sessions.[3]

New counties were organized under authority of the general court.[4] After the creation of the shires the licensing of the commissioners of small causes in the respective towns was transferred from the general to the county court;[5] but the candidates for approval were nominated by vote of the people in town-meeting.[6] The general court, however, continued to appoint special commissioners with the same powers;[7] and the selectmen could act in all cases where the magistrate was concerned.[8]

[1] *Mass. Col. Rec.*, V, 139 (1677). See also *Ib.*, 145, 101. But persons not associates were commissioned; and all assistants continued, of course, to exercise "magistratical" authority where they dwelt.

[2] Often 2 men were appointed: *Mass. Col. Rec.*, IV, Part I, 44, 180, 232, 268, etc. In 1672 one associate and one magistrate were declared sufficient to hold the court: *Ib.*, IV, Part II, 533. Cf. *Ib.*, 495, 452. Five appointed for Devon: *Ib.*, V, 30. See also *Ib.*, V, 23, 19. "Gentlemen" other than assistants it seems could be appointed: *Ib.*, V, 35.

[3] *Mass. Col. Rec.*, IV, Part II, pp. 73, 63.

[4] See Organization of Devon: *Mass. Col. Rec.*, V, 17 ff.

[5] *Mass. Col. Rec.*, II, 188; IV, Part I, 202.

[6] The colonial records are rather obscure on this point; but see *Mass. Col. Rec.*, IV, Part I, 321. The town records, however, show that the commissioners of small causes were nominated as were other town officers. For example, see *Dorchester Town Records*, 115, 150.

[7] See examples in *Mass. Col. Rec.*, IV, Part I, 287–8.

[8] *Mass. Col. Rec.*, II, 162–3.

In May, 1685, the magistrates of each county court "annually chosen by the freemen" were granted jurisdiction in equity cases.[1]

After 1691, under the second charter, the judicial system of the shire was reorganized and brought into closer harmony with the contemporary English model.

The criminal jurisdiction and the ministerial or general administrative business of the old county court were transferred to the "quarter sessions," or, as it was subsequently styled, the "general sessions of the peace."[2] This court, which in addition to its strictly judicial work, performed the duties of the modern board of county commissioners or supervisors, was composed of all the justices of the peace commissioned for the shire by the governor of the commonwealth. On the other hand the civil and chancery[3] jurisdictions were vested in the "inferior court of common pleas" composed of four justices commissioned by the governor for each county.[4] Probate and administration, hitherto transacted in the shire courts, were reserved to the governor by the charter;[5] but these functions were delegated by him to a separate judge appointed for each county.[6]

Below the general sessions and the common pleas and corresponding to the earlier courts for trial of small causes were the tribunals of the single justices of the peace with jurisdic-

[1] *Mass. Col. Rec.*, V, 477–478; Washburn, *Judicial Hist. of Mass.*, 34.

[2] Called "quarter sessions of the peace," 1692–3: *Acts and Resolves*, I, 72; and "general sessions" in 1699: *Acts and Resolves*, I, 367. The latter name had been given in the acts of June 28, 1693, and June 19, 1697, but these were not approved by the privy council: *Ib.*, I, 37, 284. Cf. Hildreth, II, 160; Lodge, 416.

[3] *Acts and Resolves*, I, 356, 75, etc.; Washburn, *Judicial Hist. of Mass.*, 166-167.

[4] *Acts and Resolves*, I, 37, 73, 284, 369. The power to create courts was vested in the assembly by the charter: Poore, I, 951.

[5] Poore, *Charters*, I, 951.

[6] But the assembly regulated their exercise: *Acts and Resolves*, I, 44, 48, 252, 431, 536, etc.

tion in minor criminal actions and in civil causes not involving more than forty shillings or when the title to land was in dispute.[1] But to single justices and to two or more justices acting together, were entrusted by special statute a great variety of police and other executive duties.[2]

(*c*).—*General Functions of the County Court.*

Aside from its ordinary judicial work, the general functions of the county court were neither few nor insignificant. Between 1636 and 1643—the first stage in the evolution of the Massachusetts shire—these functions, as we have seen, were rudimentary; but during the second (1643–1691) and third (1691–1776) phases of development, particularly under the legislation of the second charter, the position of the court as a county board of civil administration rapidly increased in importance. The following is a partial list of its more important powers and duties:

The court could exercise probate and grant letters of administration;[3] construct bridges,[4] lay out highways, and fine town road surveyors for neglect of duty;[5] admit freemen of the jurisdiction, subject to the approval of the general court;[6] appoint commissioners to solemnize marriages;[7] license clerks of the writs,[8] retailers of liquors, and keepers of ordinaries and coffee houses;[9] appoints "tryers of malt"[10] and sur-

[1] *Acts and Resolves*, I, 51, 53, 72, 282, etc.

[2] See *Acts and Resolves*, I, Index at *Justices*.

[3] Before 1691: *Mass. Col. Rec.*, V, 150, 252, 375, 478, etc. Under the second charter the court lost this function.

[4] *Mass. Col. Rec.*, IV, Part I, 231.

[5] *Acts and Resolves*, I, 138, 136–7, 721.

[6] *Mass. Col. Rec.*, IV, Part II, 134.

[7] *Mass. Col. Rec.*, IV, Part I, 322.

[8] *Mass. Col. Rec.*, II, 188; III, 105; I, 344; IV, Part I, 68.

[9] *Acts and Resolves*, I, 37, 56, 475, 527, 739, etc. See lists in *Rec. of Court of General Sessions of Worcester County*, 113, 129, 160.

[10] *Acts and Resolves*, I, 447.

veyors, gaugers, and searchers of tar in seaport towns;[1] abate common nuisances;[2] order the town treasurer to pay accounts for entertainment of strangers lying sick in the respective towns of the county, and press lodgings for such when necessary;[3] prevent the landing within the shire of persons visited with infectious diseases;[4] count the votes for county treasurer;[5] audit the accounts of treasurer and sheriff;[6] provide for the erection of prisons;[7] appoint masters of houses of correction and prescribe rules for their government;[8] and order indigent persons to be relieved by their relatives, should the latter be found able to support them.[9]

In the early period the court was particularly entrusted with the civilizing of Indians residing within the shire.[10] Special tribunals were established for causes in which Indians who had been "brought to some civility" were parties. By an act of 1647 it was provided that a court should be held quarterly by one or more magistrates in some place where the "Indians ordinarily assemble to hear the word of God," with jurisdiction in all causes civil and criminal save capital crimes; and each sachem was empowered to hold a monthly court with jurisdiction similar to that of the triers of small causes. The sachems were also authorized to issue summons and attachment and to appoint constables to serve warrants and executions. All fines collected were to be expended for erecting "meeting houses," for educating the poorer Indian children, or for some other public use.[11]

[1] *Acts and Resolves*, I, 574.
[2] *Acts and Resolves*, I, 312, 256, 645, 657.
[3] *Acts and Resolves*, I, 469–70.
[4] *Acts and Resolves*, I, 469–70.
[5] *Acts and Resolves*, I, 63.
[6] *Acts and Resolves*, I, 64, 128.
[7] *Acts and Resolves*, I, 426.
[8] *Mass. Col. Rec.*, IV, Part I, 222, 256, 305; *Acts and Resolves*, I, 378, 379.
[9] *Acts and Resolves*, I, 68. See examples in *Rec. of Court of General Sessions of Worcester County*, 54, 60.
[10] *Mass. Col. Rec.*, II, 84.
[11] *Mass. Col. Rec.*, II, 188. A similar plan for the Indians of "Naticke and

(*d*).—*Subordination of the Towns to the County Court.*

It is of special interest to determine in what measure the towns were made subordinate to the authority of the general sessions. That the latter exercised a real supervision over the former is abundantly proved by a glance at the early statutes and court proceedings. Thus the court could impose fines on assessors and selectmen for neglect of duty;[1] and on constables for failing to summon town officers elect to take the official oath.[2] It could also appoint assessors on failure of the towns so to do;[3] supply ministers and provide for their proper maintenance where necessary;[4] and, on petition or presentment, compel towns to pay the minister's salary.[5] Towns were often

Punquapog" was adopted in 1658: *Ib.*, IV, Part I, 334. By the later legislation commissioners with powers similar to the powers of these courts were appointed by the governor: *Acts and Resolves*, I, 150.

[1] *Acts and Resolves*, I, 93.

[2] Before the quarter sessions: *Acts and Resolves*, I, 65.

[3] *Acts and Resolves*, I, 166, 218, 407.

[4] *Mass. Col. Rec.*, IV, Part I, 314–15.

[5] *Acts and Resolves*, I, 103. For neglect to provide ministers or to support them it was required by law that towns should be presented before the general sessions by the grand jury: *Acts and Resolves*, I, 597. The following example of the procedure by petition is contained in the records of the general sessions of Worcester county:—

"The Reverend M^r^ David Parsons of Leicester Preferred a Petition or Complaint to this Court Shewing that in y^e^ year 1721 he accepted the Call of the Church and Town of Leicester to y^e^ Gospell ministry among them with an Incouragement of an Hon Support of Seventy five pounds &ct—from year to year In which Service y^e^ said Petitioner has Continued Ever Since according to his poor Capacity Heartyly endeavoured to be faithfull, butt that through the negligence of the Town he has not Rec^d^ any part of his dues from them since march: 1730 butt that they have been wholly Deficient Since that time praying for Reliefe according to the Directions of y good and wholesome laws of this province, which petition being duly Considered The Court order and Direct the Selectmen of y^e^ Town of Leicester be by warrant under the Clerks hand Convented before y^e^ Court of General Sessions of y^e^ peace to be holden at Worcester for and within the County of Worcester on the first Tuesday of February next To answer To Said Petition:" *Records of the Court of General Sessions*, 29–30. Subsequently the selectmen were found

fined for disregard of the laws requiring them to maintain stocks,[1] provide weights and measures,[2] and employ schoolmasters.[3]

Moreover it may surprise those who have learned that the Massachusetts town was everything and the shire nothing in the management of local affairs, to know that town by-laws were legally subject to the approval of the county court.[4] And the statute seems not to have been absolutely a dead letter. The original court records show that such by-laws, at least those relating to cattle brought into the township for pasturage, were very frequently presented to the general sessions for approval. The following is a typical example:

"A Vote or By law of y^e^ Town of Rutland was presented to this Court by Sam^ll^ Wright Esqr In behalf of Said Town viz^t^, Att a Town meeting of the Inhabitants of Rutland legally warned December 12^th^ 1733. & Vote in Said meeting that a Tax of five Shillings ℔ head shall be laid on all horses & neat Cattle that be brought into the Town of Rutland to Graze or Sumer there by any person or persons other then proprietors and they for any other then proprietors Cattle or horses or oxen hired to work or Cows to give milk and that if any person or persons living in or belonging to

guilty of neglect and fined four pounds each and costs according to law: *Ib.*, 47–9. Brother Parsons had much difficulty with his flock and furnished the court a great deal of business: see *Ib.*, 31, a note by the editor.

[1] *Acts and Resolves*, II, 156. See example of presentment by grand jury in *Records of General Sessions of Worcester*, 42.

[2] *Acts and Resolves*, I, 576; II, 977. See examples of presentment by grand jury in *Records of General Sessions of Worcester*, 35, 52–3, etc.

[3] *Acts and Resolves*, I, 63, 470. In 1692–3 the fine for neglect was fixed at 10£, and in 1701–2 at 20£ for each town of 50 householders. The original court records show that there were a great many instances of presentment by the grand jury for this offence. See *Records of General Sessions of Worcester*, 35, 51, 81, 108, etc., etc.

[4] *Acts and Resolves*, I, 66 (1692). This act was repealed 1695, but the repealing act was not approved by the privy council: *Ib.*, 218. No mention is made by the editors of its subsequent repeal: See table in *Ib.*, p. 768 (chap. 28).

Rutland aforesaid Shall bring in or take any Strangers Cattle or horses brought into Said Town to keep or take Care or Charge of Such Creatures Shall be obliged to Render an acco^{u} upon oath what & how many Such horses or Cattle they have y^{e} Charge of or Knowing to and Shall pay five Shillings $\overline{\text{p}}$ head for all Such horses or Cattle as are in their Care or Charge the money to be for the use of y^{e} Town and this act to be laid before the Justices at y^{e} next Quarter Sessions to be held at Worcester for y^{e} County of Worcester for their Confirmation, Voted that Samuell Wright Esqr is Chosen by the Town to lay y^{e} above Written act before y^{e} Said Court for Confirmation. Samuel Wright moder^{r}, which is accepted alowed & approved of y^{e} Justices."[1]

(*e*).—*Records of a Court of General Sessions.*

What has already been said of the historic value of the court records for the early period must be repeated with emphasis for those of the general sessions during the eighteenth century. They seem to have increased in interest and in richness of detail with the growth in population. Judging from the brief portion of those of Worcester County now in print, edited for the Worcester Society of Antiquity by Franklin P. Rice,[2] no perfect picture of the social condition of the age can be drawn until these judicial archives be thoroughly explored. Certainly the materials are not a whit less interesting than those which have enabled Mr. Hamilton to produce his fascinating book on the contemporary quarter sessions

[1] *Records of the General Sessions of Worcester County*, 92–3. See other examples, *Ib.*, 103, 104, 123, 152, 155, 182. These all relate to cattle, horses, or rams. By an act of 1727 the proprietors of common fields are authorized to make by-laws, subject to approval of the general sessions: *Acts and Resolves*, II, 425. Of course, it is not maintained that as a rule ordinary measures of the town-meeting were, in practice, submitted to the court.

[2] Records of the Court of General Sessions of the Peace for the County of Worcester, Massachusetts, from 1731 to 1737, 197 pages, 8°, Worcester, 1883.

of Devon.[1] A single example, in addition to the citations already made, must here suffice to illustrate the value of the Worcester records which, doubtless, may be regarded as typical.

If any one fancies that the laws forbidding absence from church, or labor, travel, and recreation on the sabbath,[2] were in any sense a dead letter even in the middle of the last century, his illusion will be speedily dispelled by a glance at the vast number of cases of presentment and fine for these offences entered in the minutes of a single court for the short period of seven years. Almost every page furnishes examples.[3] The following typical report of a grand jury will illustrate the subject in hand and may prove otherwise instructive:[4]

"Worcester ss att a Generall Sessions of y^e^ Peace holden at Worcester within and for the County of Worcester on Tuesday

[1] Quarter Sessions from Queen Elizabeth to Queen Anne; Illustrations of Local Government and History, drawn from Original Records, by A. H. A. Hamilton. London, 1878.

[2] It was enacted that if any person without just excuse "being able of Body and not otherwise necessarily prevented, shall for the space of one Month together absent themselves from the publick Worship of God on the Lord's-Day, they shall forfeit and pay the Sum of ten Shillings." Cited by Mr. Rice, *Records of the General Sessions*, 44.

It was provided in 1712, "That all persons who shall be found in the streets, wharffs, fields, or other places within any town, on the evening following the Lord's day, disporting, playing, making a disturbance, or committing any rudeness, the persons so offending shall, each of them, pay a fine of five shillings, or suffer twelve hours imprisonment, or sit in the stocks not exceeding two hours" . . . "And the Constables of the respective towns are hereby directed and specially impowred to prevent the prophanation of the Lord's day, by restraining persons from walking, recreating and disporting themselves in the streets, wharffs or fields, in time of publick worship." *Acts and Resolves*, I, 681. For a more detailed and rigorous statute see *Ib.*, 58. Cf. *Mass. Col. Rec.*, IV, Part I, 150, 200, 347; V, 133, 155.

[3] For instance see *Records of the General Sessions*, 36, 44, 65, 66, 74, 79, 85, 141, 146, 158, etc., etc. A very large portion of the records consists of these cases.

[4] The punctuation of the passage has been slightly altered.

y^e^ Sixth day of November anno Domini 1733. The Grandjurors for y^e^ body of y^e^ Said County upon their Oaths do presentt; That Dudley Jordan and Benjamin Smith both of Lambs Town[1] as so Called in said County, Husbandman, did on y^e^ 28^th^ day of october last past being y^e^ Lords day Unnecessaryly Travell through y^e^ Town of Shrewsbury In Said County —and also that—the wife of Thomas Hutchins of Dudley in Said County hath Unnecessaryly absented herself from y^e^ Publick Worship of God on y^e^ Lords days for more than Two months last past, and also That David Haynes of Sudbury in y^e^ County of Midlesex, Gent, and Samuel Waldo of Boston in y^e^ County of Suffolk, merchant, and George Mareiss of Boston aforesaid, Waiter, did each and all of them Unecessaryly Travell from Rutland to Worcester On y^e^ Lords day being y^e^ 23^d^ day of September last past, and also that Samuel Bridges Husbandman & Mary Godman Housewife and Mehittable Bridges Spinster all of Mendon in y^e^ County of Worcester and Bethhya Gassett of Southborough in Said County Spinster Each and all of them for Unecessaryly absenting themselves from y^e^ Publick Worship of God for more then Two months last past; and also that Daniel Taft of Mendon in y^e^ County of Worcester Esqr about Six weeks Since at y^e^ House of William Jenison Esqr in Worcester in Said County did Wittingly and Willingly make and Spread a false Report against Samuel Terry of Mendon aforesaid Clerk with Intent to abuse and deceive y^e^ Said Terrey and Others by Saying that m^rs^ Rawson Told him y^t^ the Said Terrey was so bad of it—meaning that he was So disguised with drink—that he was led or put To bed on one Scacrament day night, and that Grindall Rawson and m^r^ Dorr were y^e^ persons that put him To bed, all which things are against the peace of our Sovereign Lord George by y^e^ Grace of God of Great Britain France

[1] Now Hardwick, according to Editor Rice.

and Ireland King defender of y^e^ faith &ct and y^e^ Good and wholsome laws of this province."[1]

(*f.*)—*Officers of the County Court.*

The officers of the county court were the marshal, superseded after 1791 by the sheriff, and the clerk, called in the later period clerk of the sessions or of the peace. The latter, in addition to his duties as keeper of the judicial records, was *ex officio* recorder of the county, thus discharging the functions of the modern county clerk. The marshal performed the usual executive functions of sheriff: making arrests, collecting fines, and serving executions. But in the first days of the colony all this business was transacted by the "general marshall," or as he was originally styled, the "beadle" of the entire jurisdiction.[2]

[1] *Records of the General Sessions*, 85. Cf. *Ib.*, 79, 65, 36, etc., etc. For the value of the court records of Essex County relative to the trials of Quakers, 1656–77, see Hallowell, *The Quaker invasion of Massachusetts*, 126 f.; also Clever, *The Prosecution of Philip English and his Wife for Witchcraft* in *Hist. Coll. Essex Inst.*, II, 21 ff., 73 ff., 133 ff, 185 ff., 237 ff.; also other trials for witchcraft in *Ib.*, II, 49 ff.; VIII, 17 ff. Interesting details are given in Mr. Kimball's *Gleanings from Files of the Court of General Sessions of the Peace: Hist. Coll. Essex Inst.*, XI, Parts I–III. Some contemporary references to the judicial system of Massachusetts may be found in the following: Johnson, *Wonder-Working Providence*, in 2 *Mass. Hist. Coll.*, IV, 22; Hubbard, *Hist. of New England*, in 2 *Mass. Hist. Coll.*, V, 156, 234–5; VI, 551; Lechford, *Plaine Dealing*, in 3 *Mass. Hist. Coll.*, III, 83–86; Shepard, *The Cleare Suns-Shine of the Gospel*, in 3 *Mass. Hist. Coll.*, IV, 48–9 (Indian Courts); Josselyn's *Account*, in 3 *Mass. Hist. Coll.*, III, 325; *Mem. Hist. Bost.*, I, 234; Savage, *Gleanings*, in 3 *Mass. Hist. Coll.*, VIII, 333.

Among more recent writings, see Washburn, *Judicial Hist. of Mass.*; and brief notices in Lodge, *Short Hist.*, 415–17; Channing, *Town and County Govt.*, 34–5; Palfrey, *Hist. of New England*, I, 334, 256; II, 16; IV, 129; Hildreth, I, 233; II, 170.

[2] The beadle is mentioned in *Mass. Col. Rec.*, I, 74, 40, 100. "Marshall" seems to have been substituted in 1634: *Ib.*, 128. On the county marshal see *Ib.*, IV, Part I, 18, 183, 184; IV, Part II, 59, 350; III, 340–1, etc. By

Originally both marshal and clerk seem to have been appointed by the court; and, after 1691, the latter continued to be so chosen.[1] But by the charter the nomination of sheriff was vested in the governor.[2] While the town remained the unit of representation in the assembly, under the Province laws the county gained one function which raised it more nearly to a level with the contemporary English model: the sheriff was required to issue his precept to the selectmen of the various towns to assemble the freemen for the choice of deputies; and the names of those elected were then to be certified by the selectmen to the sheriff, who made return to the secretary of the province.[3]

III.—The Shire as a Fiscal Unit.

(*a*).—*The County Rate.*

Throughout New England the towns have always been self-taxing bodies for the support of local government. But besides the town rate there were two other levies in each of which the shire was directly concerned: these were the "county" and "country" rates.

The chief items of county expenditure were the fees and salaries of officers, the construction and repair of bridges and highways, the support of houses of correction, and the maintenance of courts, including the fees of grand jurors.[4] The standing sources of revenue consisted of fines and costs of prosecutions.[5] When these did not suffice the county court was empowered to supplement them by a tax levied upon the

the second charter the governor was authorized to appoint both sheriffs and provost-marshals: *Acts and Resolves*, I, 12, 89, 402, 555.

[1] *Acts and Resolves*, I, 217, 374, 465.

[2] *Acts and Resolves*, I, 12; Poore, I, 949.

[3] *Acts and Resolves*, I, 89 (1692).

[4] *Acts and Resolves*, I, 194.

[5] *Acts and Resolves*, I, 63, 193, 210, 287, 314, etc.

towns in the same proportion as the last public rate. This was then collected and turned over to the county treasurer by the constables.[1] The levy of the county rate was thus wholly under control of the court.

The fiscal officer of the county was the treasurer chosen by popular vote. The office was created in 1654, eleven years after the creation of shires. It was ordered that annually on the last Tuesday of June[2] the freemen of the county in their various towns should vote for treasurer by "sealed proxies," those of each town being carried to the shire town by a delegate, known as the "shire commissioner," elected for that purpose. The proxies were then to be opened by the assembled commissioners in the presence of a magistrate, and the person receiving the most was to be declared duly elected.[3]

By the very important act, just cited, the mutual relations of clerk and treasurer are defined and regulations for the administration of their respective offices prescribed. The clerk is directed to keep a record of all dues and expenditures, the magistrates being required to forward to him transcripts of all fines levied by them and under their warrants paid into the county treasury by the marshal or constables. A like transcript of dues and fines is to be delivered by the clerk to the treasurer; and the latter is required to render an annual account to the county court,[4] which, if a deficit appear, is then to levy a county rate.[5]

This whole procedure, which bears a striking resemblance to that still observed in modern county administration, remained substantially the same throughout the whole colonial era.[6] The treasurer was still voted for in the towns; but the constables,

[1] *Mass. Col. Rec.*, IV, Part I, 185; *Acts and Resolves*, I, 63–4.

[2] Subsequently the day of election was made to correspond with that for choice of magistrates: *Mass. Col. Rec.*, IV, Part I, 259.

[3] *Mass. Col. Rec.*, IV, Part I, 185; *Proceedings of the Deputies*, *Ib.*, III, 398–9.

[4] For the procedure under the province laws, see *Acts and Resolves*, I, 64.

[5] *Mass. Col. Rec.*, IV, Part I, 184–6.

[6] *Acts and Resolves*, I, 63–4, etc.

in place of the shire commissioners, made return before the general sessions.[1]

(*b*).—*The Country Rate.*

The history of the "country rate"[2] and of the shire's functions with respect to it, is extremely interesting. Throughout New England the town was the unit for the assessment and collection of the public revenue. The earliest taxes in Massachusetts were levied upon the various communities in stated sums;[3] the quota of each being then assessed by the proper officer and collected by the constable.[4] A poll-tax was not allowed.[5] But in November, 1646, appeared an important statute by which was outlined the broad features of the system of taxation maintained throughout the entire colonial period. The principle adopted was peculiar, combining the three-fold elements of polls, property, and income. Every male of sixteen years and upward, "whether servant or other," was required to pay an annual poll-tax of 20d.; all owners of estates, whether lands or goods, were to contribute one penny for every 20s. valuation; every laborer, artificer, or handicraftsman who usually receives 18d. a day in summer, or, if he "worke by greate," an average of more than that amount, must pay annually 3s., 4d., in addition to his poll-tax; and all others—butchers, bakers, cooks, victuallers, and the like—shall contribute "according to their returnes

[1] *Acts and Resolves*, I, 63.

[2] For a definition of the public or country rate see *Mass. Col. Rec.*, I, 277; II, 260, 171.

[3] *Mass. Col. Rec.*, I, 77, 93 (Feb. 1632). Once at least, money was raised by private subscription for erection of a "moveing ffort:" *Mass. Col. Rec.*, I, 113.

[4] *Mass. Col. Rec.*, I, 160, 179, 240, 260.

[5] An order of May, 1634, runs: "In all rates & publique charges the townes shall haue respect to levy eũy man according to his estate, & with consideracõn of all other his abilityes, whatsoeuer, & not according to the number of his p'sons:" *Mass. Col. Rec.*, I, 120.

and incommings." Children and servants receiving no wages are to be paid for by their parents or masters; while the poor, sick, or infirm are entirely exempt, as also magistrates for 500£ estate.[1]

Thus was the "country rate" established; and thereafter it was customary for the general court to order the levy in multiples or fractions of a "single" rate.[2]

(*c*).—*Equalization of Assessments.*

The act under consideration provided also for equal assessment of the tax throughout the shire. Each town was required to elect one of its inhabitants, known thereafter as the "town commissioner," to join with the selectmen in assessing incomes and estates and in making the list of males subject to the poll-tax. On the second Wednesday of the month following the assessment, all the commissioners of the county were to meet in the shire town to act as a board of equalization. This arrangement is of special interest as constituting an early precedent for the action of the board of supervisors under the modern county-township system of the northwestern states.

In the following year the act was repealed; but essentially the same plan was incorporated in a new order,[3] the only

[1] *Mass. Col. Rec.*, II, 173–4.

[2] See many examples in the *Mass. Col. Rec.*, of ¼, ½, or 3, 7, or 9 single rates, etc. In the Plymouth jurisdiction public taxes were levied according to "visable estate and faculties," not upon polls or incomes: *Plymouth Col. Rec.*, XI, 142, 211, 241. See examples of rates in *Ib.*, II, 18, 47, 64, etc. However in the early period the rate was levied by the general court in stated sums, the separate amount due from each taxable person in the colony being named in the order: see lists in *Plym. Col. Rec.*, I, 9–11, 27–29. In the New Haven and Hartford jurisdictions practically the same system existed as in Massachusetts: *New Haven Col. Rec.*, I, 25, 494; Trumbull, *Blue Laws*, 119; *Conn. Col. Rec.*, I, 548–551; II, 48–9.

[3] *Mass. Col. Rec.*, II, 212–15.

important change being the increase of the poll-tax to 2s., 6d.; reduced, however, in 1653, to 20d. as before.[1]

By the procedure thus far adopted there was no means of preventing unequal assessment as between different shires. This defect was remedied in 1668 by the creation of a new board of equalization. It was provided that the general court should appoint two "county commissioners"[2] for each shire who should meet with the town commissioners in the respective shire towns, on different specified days, to revise the assessment "so as that there may be a just and aequall proportion betweene county and county, toune and toune, merchants and husbandmen."[3] This plan does not seem to have been retained in the eighteenth century;[4] but the town commissioners still continued to meet in the shire town as before;[5] and the general sessions had power to grant relief in cases of unjust discrimination.[6]

During the early period merchants and others whose estates were "not so obvious to view" were rated "by the rule of comon estimation, according to the will and doome of the assessors."[7]

(*d*).—*Taxes Payable in Kind.*

It is a fact worthy of special mention that throughout New England, as indeed elsewhere, during the seventeenth

[1] *Mass. Col. Rec.*, IV, Part I, 154–5. The same system of poll and property tax was retained during the period of the second charter: *Acts and Resolves*, I, 16, 29, 30, 214, 228, 515, 615, etc.

[2] It is important to keep separate the three sets of commissioners: the "town commissioners," the county commissioners of equalization appointed by the general court, and the "shire commissioners" chosen by the respective towns to carry the votes for county treasurer to the shire town.

[3] *Mass. Col. Rec.*, IV, Part II, 363–4, 444. Cf. the plan adopted in Connecticut: *Col. Rec.*, I, 549; II, 48.

[4] The modification of the procedure adopted in 1692–3 was not to be a precedent: *Acts and Resolves*, I, 92, 106.

[5] *Acts and Resolves*, I, 615, 515, 516, 214, etc.

[6] *Acts and Resolves*, I, 406 ff.; II, 866, 963.

[7] *Mass. Col. Rec.*, IV, Part I, 37–8; V, 139.

century—just as in the days of the Norman vicecomes—taxes were payable in kind,[1] or in "country pay," as the records have it.[2] Beaver[3] and wampum[4] were also recognized as legal tender for this purpose; but in Massachusetts the acceptance of the latter was prohibited in 1649[5]—a precedent followed by the Plymouth jurisdiction in the next year.[6] In the former colony, however, it remained a legal tender in payment of private debts.[7]

Often in the order directing the levy the portion which must be paid in money or the rebate for cash is specified;[8] and the countless measures for regulating the "prizes" at which produce or stock shall be taken, prohibiting the acceptance of "leane cattell,"[9] and prescribing the mode of appraisement,[10] or the method of transportation,[11] fill a great space in the early records.

[1] In Massachusetts, as late as October 1685, the prices of corn and other produce receivable in payment of rates were fixed by order of the general court: *Mass. Col. Rec.*, V, 505. Cf. *Plym. Col. Rec.*, I, 9, 26; II, 45; Connecticut Code, 1650: Trumbull, *Blue Laws*, 122; *New Haven Col. Rec.*, I, 60; II, 15, 181, 221, etc.; *Rhode Island Col. Rec.*, II, 358–9; *Conn. Col. Rec.*, I, 12, 13, 79, 549; II, 322, etc.

[2] So-called in *Mass. Col. Rec.*, V, 296, 417. "Specie" for produce is also used: *Ib.*, I, 304; V, 81.

[3] *New Haven Col. Rec.*, II, 15, 181, 221; *Mass. Col. Rec.*, I, 180; II, 27, 112; *Conn. Col. Rec.*, I, 12, 13.

[4] *Plym. Col. Rec.*, XI, 57, 128; *Mass. Col. Rec.*, II, 27, 48; IV, Part I, 36; *R. I. Col. Rec.*, I, 217, 392, 400, 474; 2 *Mass. Hist. Coll.*, V, 100, 168, 171; *Conn. Col. Rec.*, I, 12, 13, 61, 79, 179, 546.

On wampum as a legal tender see the interesting monograph of William B. Weeden in *J. H. U. Studies, Second Series*, VIII–IX; also Dr. Bronson's *Hist. Account of Conn. Currency* in Vol. I of *New Haven Hist. Soc. Papers*.

[5] *Mass. Col. Rec.*, II, 279.

[6] *Plym. Col. Rec.*, XI, 57.

[7] *Mass. Col. Rec.*, IV, Part I, 36 (1650).

[8] *Mass. Col. Rec.*, IV, Part II, 568; V, 45, 55, 245, 443, etc.

[9] *Mass. Col. Rec.*, IV, Part II, 464.

[10] *Mass. Col. Rec.*, I, 295, 303, 340; IV, Part II, 350.

[11] *Mass. Col. Rec.*, V, 66.

IV.—The Shire as a Militia District.

(*a*).—*The Train Band.*

"See then you store your selves with all sorts of weapons for war, furbish up your Swords, Rapiers, and all other piercing weapons. As for great Artillery, seeing present meanes falls short, waite on the Lord Christ, and hee will stir up friends to provide for you: and in the meane time spare not to lay out your Coyne for Powder, Bullets, Match, Armes of all sorts, and all Kinde of Instruments for War."

Such is the quaint but sober admonition of the author of *Wonder-Working Providence* to the pioneers of New England.[1] And of a truth the maintenance of military discipline was long a matter of primary necessity. If each hamlet may properly be regarded as at once a body politic and a congregation of common worshippers, it may with equal truth be styled a band of fellew soldiers. The public trainings began and closed with prayer;[2] and that each town should set apart a "training field" or "training green," was as much a matter of course as the reservation of a common pasture or the build-

[1] Edward Johnson, *History of New England; Wonder-Working Providence of Sions Saviour, in New England*, London, 1654: 2 *Mass. Hist. Coll.*, II, 59.

[2] "Being come into the field, the captain called us all into our close order, in order to go to prayer, and then prayed himself. And when our exercise was done, the captain likewise concluded with prayer. I have read that Gustavus Adolphus, the warlike king of Sweden, would before the beginning of a battle kneel down devoutly, at the head of his army, and pray to God, the giver of victory, to give them success against their enemies, which commonly was the event; and that he was as careful also to return thanks to God for the victory. But solemn prayer in the field upon a day of training, I never knew but in New England, where it seems it is a common custom. About three of the clock, both our exercise and prayers being over, we had a very noble dinner, to which all the clergy were invited:" John Dunton's *Life and Errors*, 1686, in 2 *Mass. Hist. Coll.*, II, 107.

ing of a public meeting-house.[1] The amount of time originally allotted to training is really astonishing. By one of the first military orders of the Massachusetts court of assistants, each captain was required to train his company on Saturday of every week.[2] Soon after once a month was thought sufficient;[3] and in 1637 the number of training days was reduced to eight each year.[4] The town was the unit of organization—each furnishing its company;[5] but a sort of general command was conferred upon Captains Patrick and Underhill who were chosen for the "country's service."[6]

In those days every man, "as well servants as others," only magistrates and ministers being exempt, was a soldier and required to provide himself with arms. If too poor to buy them, they were supplied by his town until he should be able to give "satisfaction."[7] And in like spirit, each company was expected to support its own officers.[8]

The early history of the militia in the other New England colonies differs only in detail from that of Massachusetts.[9]

[1] 2 *Mass. Hist. Coll.*, II, 179 (Charlestown); III, 183 (Plymouth); IV, 203 (Boston).

[2] *Mass. Col. Rec.*, I, 85 (April, 1631).

[3] Prince, *Annals of New England*, in 2 *Mass. Hist. Coll.*, VII, 26, 32, 72–3; *Mass. Col. Rec.*, I, 90 (July 26, 1631).

[4] *Mass. Col. Rec.*, I, 210. Finally changed to four times: *Ib.*, V, 211–12 (1679); *Acts and Resolves*, I, 129.

[5] *Mass. Col. Rec.*, I, 190–1.

[6] *Mass. Col. Rec.*, I, 191 (1637). In the beginning there seem to have been two companies only, made up from the various hamlets and commanded by these captains: *Mass. Col. Rec.*, I, 77, 90.

[7] *Mass. Col. Rec.*, I, 84.

[8] *Mass. Col. Rec.*, I, 99, 160.

[9] *Conn. Col. Rec.*, I, 4, 15, 30, 97, etc.; Levermore, *Rep. of New Haven*, 48 ff.; *Rhode Island Col. Rec.*, I, 61, 64, 104, 121, 226, 381, 402, etc.; for Plymouth, Dr. Adams, *Norman Constables*, 17 ff.; *Plymouth Col. Rec.*, XI, 30, 36, 180, 251, etc.

(*b*).—*The Regiment Formed.*

The general control of the militia of the entire jurisdiction was at first entrusted to a committee of assistants;[1] but soon it was placed in the hands of the "standing council."[2] In December, 1636, the companies were first grouped in three regiments;[3] but the regimental districts did not correspond respectively to the jurisdictions of the quarter courts organized in the preceding March, which, as we have seen, were the germs of the future shires.[4] However in September, 1643, appeared a most important statute by which the regiment was based on the shire and the militia organization fully elaborated. By this act the general court delegates its supreme military authority to a council of which the governor is one. To lead and direct their forces and to execute their orders, a "sergeant major general" is to be chosen by the council.[5]

It is also provided that for each shire a "lieutenant" shall be appointed, with power to levy the forces of the shire in cases of sudden emergency when timely notice connot be given to the governor and council. This office was probably suggested by that of the English *lord lieutenant;* but it is doubtful whether it was ever really instituted, as there seems to be but one further mention of it in the records.[6] Moreover, by the

[1] *Mass. Col. Rec.*, I, 125.

[2] *Mass. Col. Rec.*, I, 183, 192. This seems to have been the famous "standing council" of 1636, composed of the governor and of certain assistants chosen for "tearme of their lyves:" *Mass. Col. Rec.*, I, 167. On the significance of this institution as an oligarchic device, see Oliver, *Puritan Commonwealth*, 63–4.

[3] *Mass. Col. Rec.*, I, 186–7.

[4] Still the first regiment included Boston, Roxbury, Dorchester, Weymouth, and Hingham—nearly the same as the jurisdiction of court No. 4 of 1636, and Suffolk shire, 1643. See Dr. Channing's monograph, 34–5.

[5] But in Oct. 1643, it was provided that he should be chosen by the freemen at the general court of election in the same manner as the governor: *Mass. Col. Rec.*, II, 49.

[6] In the act of Oct. 1643, where it is provided that the sergeant major

order under discussion, the actual command of the regiment of each shire is entrusted to the "sergeant major."

It is further provided by this act that each regiment shall be divided into companies according to towns, the smaller places combining to furnish a full quota. A "beacon fired," four muskets discharged, and a drum beaten, are to constitute an alarm. Each year there is to be a court or meeting consisting of all the majors and lieutenants of shires, together with the governor and council, to punish disorders, provide for appointment of officers, and take all needful measures for carrying out the military administration. A similar meeting is to be held once or twice annually by the officers of each regiment or shire.[1]

In the month following a supplementary order was passed directing that the sergeant major should be elected by the "freemen of every shire" by sealed proxies, which were to be opened in a meeting of the deputies of the townships held in the shire town.[2]

Still another act was passed in May, 1645, by which not only freemen but all who have taken the oath of fidelity, except servants and "unsettled" persons, are allowed to vote for majors; and captains of companies or other officers are authorized to administer the oath and required to certify the names of those taking the same to the county court. By this statute the duties of the very important office of "clerk of the band" are fully defined. The clerk like other officers was chosen by the company.[3] It was his duty to be present on training days, to call the roll, take note of the defects and offences of the "soldiers," and, at least once a year, to institute

shall perform the duties of lieutenant, unless the latter be appointed: *Mass. Col. Rec.*, II, 50.

[1] For the act see *Mass. Col. Rec.*, II, 42–3.

[2] *Mass. Col. Rec.*, II, 49–50; cf. *Ib.*, 62. For a very good account of the militia organization in this period with details as to particular companies, see Edward Johnson, *Wonder-Working Providence*, in 2 *Mass. Hist. Coll.*, VII, 52–8.

[3] But subject to the approval of the county court: *Mass. Col. Rec.*, II, 222.

a view of arms. He was empowered, with approval of the chief officers, to impose a fine of five shillings for each absence from training or defect in the watch, or one of ten shillings for failure to come provided with the proper arms and ammunition; every soldier being required to have "one pound of powder, 20 bullets, and 2 fathome of match, with musket, sword, bandilers, and rest."[1]

Thus once more, as in the ancient völkerschaft and its representative the English scir, appears, in the gathering of the train bands of the new Essex, Norfolk, or Suffolk, a veritable assembly of the *fyrd* or folk in arms.[2]

(*c*).—*Boy Train Bands—The Alarm.*

Various measures for securing an efficient militia were adopted by the general court. For example, in 1645, it was ordered that—

"Whereas it is conceived y^t^ y^e^ training up of youth to y^e^ art & practice of armes wilbe of great use in y^e^ country in divers respects, & amonge y^e^ rest y^t^ y^e^ use of bowes & arrowes may be of good concernm^t^, in defect of powder, . . . it is therefore ordered, y^t^ all youth w^th^in this iurisdiction, from ten yeares ould to y^e^ age of sixeteen yeares, shalbe instructed, by some one of y^e^ offic^rs^ of y^e^ band, or some oth^r^ experienced souldier whom y^e^ cheife officer shall appoint, upon y^e^ usuall training dayes, in y^e^ exercise of armes, as small guns, halfe pikes, bowes & arrowes &c, . . . p'vided y^t^ no child shalbe taken to y^e^ ex^r^cise against y^ir^ parents minds."[3]

The provision for alarms reminds us of the plan adopted in Maryland.[4] A "gennerall alarum" is sounded by the discharge

[1] *Mass. Col. Rec.*, II, 117 f., 191.

[2] Such, certainly was the regiment of each New England shire, when met under sergeant major or lieutenant, as truly as was the *fyrd* led by his ancestor, the ancient ealdorman of East Anglia or Kent.

[3] *Mass. Col. Rec.*, II, 99. See also *Ib.*, p. 223 (1647).

[4] See Chap. V, IV, (*b*).

of three muskets or the continual beat of a drum, by the firing of a beacon, the discharge of a piece of ordinance, or by a messenger; and every "trayned souldjer" is required to respond under penalty of five pounds. The "speciall alarum" for each town consists of the discharge of one musket, which each sentinel must answer by crying "arme, arme," at every house in his quarter.[1]

In 1652 "all Scotchmen, Negroes, and Indians," between sixteen and sixty years of age, dwelling with or being servants of the English, are required to be listed for the trainings. At the same time was created a "committee of militia" for each town consisting of the magistrates or deputies and the three chief militia officers residing therein, which was to exercise general authority over the watch and the local military affairs.[2]

(*d*).—*Overthrow of the Democratic Constitution.*

The year 1668 marks an important epoch in the history of the militia organization of Massachusetts. Thus far it had rested on the democratic principle of popular election. Henceforth all commissioned officers are to be appointed by the general court, or, in cases of emergency, by the "council of the commonwealth;" while appointments to inferior posts are to be made by the commissioned officers of the company, or where none are, by the major of the regiment.[3] Subsequently, however, the town committees of militia were authorized to nominate the higher company officers, to be commissioned by the general court.[4]

By the charter of 1691, the appointment of commissioned officers was vested in the governor, the inferior nominations being made as before. But previous to the Revolution, few

[1] *Mass. Col. Rec.*, II, 223. On the constitution of the watch, see *Ib.*, 224.
[2] *Mass. Col. Rec.*, IV, Part I, 86–8. On the town *watch*, see Chap. II, IV, (*d*).
[3] *Mass. Col. Rec.*, IV, Part II, 368, 422.
[4] *Mass. Col. Rec.*, V, 30 (1675). Cf. *Ib.*, 66, 79.

important changes were made in the military constitution of the province.

V.—Genesis of the Primary and the Nominating Convention.

(*a*).—*Election by Sealed Proxies.*

Throughout the whole period of the first charter, in Massachusetts, the assistants,[1] the governor,[2] deputy governor, and other officers of the jurisdiction were chosen in the "general court of election" by the entire body of freemen voting, at the option of the individual, either in person or by sealed proxies.[3] But this method was cumbrous and expensive, and consciousness of the fact found occasional expression in various measures, none of which, however, effected any radical or lasting improvement. For example, in 1641, the general court submitted the following plan to the towns for ratification:

"It being found by experience that the cou^{r}se of elections had neede to bee brought into some better order, the freemen growing to so great a multitude as wilbee overburthensome to the country, & the day appointed for that servise will not affoard sufficient time for the same, and the way of p'xies (as it is called) is found subiect to many miscarriages, & losse of oportunityes for advise in the choyse," therefore it is suggested "that in ev^{r}y towne w^{ch} is to send a deputy to the Court, the

[1] By the charter the assistants were to be 18 in number; but, as a matter of fact, until 1680, the full number was never chosen: *Mass. Col. Rec.*, V, 291, 261–2.

[2] Except in 1630, when it was enacted that the governor and deputy were to be chosen by the assistants; but the freemen resumed the right in 1632: *Mass. Col. Rec.*, I, 79, 95. On the significance of the act of 1630, see Peter Oliver, *Puritan Commonwealth*, 51 ff.

[3] The same system prevailed in the other New England colonies: *Plymouth Col. Rec.*, XI, 7, 10, 41, 78–81, etc.; *Rhode Island Col. Rec.*, I, 148–9; II, 62; *Conn. Col. Rec.*, I, 21–2, 346–7; II, 131, etc. On the elective system of Massachusetts, compare Doyle, *English Colonies*, II, 253–4. Proxies were first used in 1636: Washburn, *Judicial Hist. of Mass.*, 19–20.

ffreemen to meete before the Court of Election, & for ev^{r}y ten freemen to choose one, to bee sent to the Court, wth power to make election for all the rest, & in this way to bee at liberty whether they will ioyne altogether or vote severally, or to vote so as ev^{r}y one that hath 10 votes shalbee an electo^{r}, & ma^{trats} & eld^{rs} to put in their votes as other freemen."[1]

It does not appear from the records that this suggestion received the approval of the towns.

Again in 1663, it was enacted that "for tjme to come all votes of the freemen in each toune wthin this juridiction be sent in proxies, sealed vp, as the lawe requireth, & that none be admitted to giue votes personally at the day of elecc̃on, except the members of the Generall Court."[2] But this method did not prove satisfactory, and the act was repealed in the following year.[3]

At an early day[4] secret ballot had been substituted for show of hands in the choice of public officers, and in 1643 a curious method of balloting, reminding us of early Athenian days, was instituted. It was ordered that "for the yearly choosing of Assistants for the time to come, insteed of pap's the freemen shall use Indian beanes, the white beanes to manifest election, the black for blanks."[5] Subsequently this plan was renewed for taking the proxies in the various towns for assistants; but those for governor and other officers were to be given "by writing, open, or once foulded, not twisted or rouled up."[6] Still later, in 1680, Indian corn was substituted for beans in taking proxies for magistrates.[7]

[1] *Mass. Col. Rec.*, I, 333.

[2] *Mass. Col. Rec.*, IV, Part II, 86.

[3] *Mass. Col. Rec.*, IV, Part II, 134. The law of 1647, below cited, required all proxies for public officers and assistants to be handed in to the town deputies in advance, but it did not give satisfaction: Winthrop, *Hist. of New England*, II, 379; *Mass. Col. Rec.*, II, 220.

[4] In 1634 and 1635: Washburn, *Judicial Hist. of Mass.*, 19–20.

[5] *Mass. Col. Rec.*, II, 42.

[6] *Mass. Col. Rec.*, II, 220 (1647).

[7] *Mass. Col. Rec.*, V, 292.

(*b*).—*Method of Nominating Assistants.*

If little was done directly to remedy the defects of the mixed method of voting by personal ballot and sealed proxies, the procedure at elections was much simplified, in the case of magistrates, through the gradual development of a nominating system, which is of peculiar interest in this connection, not only because it comprised the elements of the modern primary and convention, but because the shire was employed as a factor therein.

The first attempt to regulate nominations seems to have been in May, 1640. The general court, "takeing into consideration how the liberty of the freemen in matter of election of magistrates . . . may bee p'served, & w^th^all how dewe order may bee setled in the exercise of this liberty," ordered that in the town-meeting for choice of deputies, the latter, "being so chosen, shall p'pound to the freemen whom they would have put to nomination for magistrates at the next Court of Elections, & shall then set downe the names of such as shalbee so nominated, & the certaine number of votes w^ch^ every man so named shall have & shall make a true returne of the same at the next Generall Court." The magistrates and deputies are then to canvas the returns from all the towns and "take note of so many as have the greater number of votes, . . . till they have so many (if so many bee returned) as will make up the full number of Assistants." The latter are to be "returned back by the deputies to the severall townes" as the accepted candidates, and no others may be voted for at the court of election "but such as shall come to nomination in the order aforesaid."[1]

By the system thus instituted, it will be readily seen, the nominations were really made at the "primaries" under the

[1] *Mass. Col. Rec.*, I, 293.

town deputies as returning officers; while the functions of a canvassing board of the complete returns were discharged by the general court. But in 1642 another method was substituted, strikingly similar to the existing modern procedure. It was enacted that every town in the jurisdiction shall choose one or two freemen, to meet at Salem the first Wednesday in April, there to agree upon a certain number "of the most able and fit men" to be put in nomination for assistants, whose names shall be certified to the colonial secretary; and those only thus nominated shall be eligible.[1]

Here we have not only the "primaries" for choice of delegates, but also a veritable "state convention" with deliberative powers. However in the following year, the act of 1640 was revived.[2]

Finally, in 1644, was adopted a different plan which was retained, with but slight modification, until the establishment of the royal government. The procedure instituted by this act consists of four stages: 1. The ballot for candidates in the primaries or town-meetings, each freeman voting for whom he sees fit. 2. One or two "selectmen"—not to be confused with the representative board of the same name—duly elected for this purpose, are to carry the votes of each town under seal to the shire town; and all the delegates when there assembled are to choose one or two from their own number, called "shire selectmen," to carry the votes, sealed up in one paper, to Boston. 3. The convention of shire selectmen, in the presence of two magistrates, is required to count the votes and report to the respective town "selectmen" the names of the seven candidates for assistants receiving the greatest number. 4. The said selectmen of each town are to call a meeting in which shall be announced the names of the candidates; and only those so nominated, as

[1] *Mass. Col. Rec.*, II, 21.
[2] *Mass. Col. Rec.*, II, 37.

by the acts already cited, shall be put to vote at the court of election.[1]

The essential features of the system adopted in 1644 were retained in subsequent enactments.[2] The shire selectmen or "commissioners," as they were henceforth called, continued to discharge the same functions; but they reported the names of candidates nominated directly to the constables, instead of to the selectmen, of the various towns.[3]

(*c*).—*The Shire Proposed as the Unit of Representation.*

The employment of town deputies instead of "knights of the shire" has always been so characteristic a feature of New England constitutional life, that the following proposal of the general court, 1644, to substitute county representation, is not without a certain historical interest:—

It is recited that "whereas wee having found by experience y^t^ y^e^ charge of this Gen^r^all Co^r^t groweth very great & burthensome, in regard of the continuall increase of deputies sent unto y^e^ same, & furth^r^ foreseeing y^t^ as townes increase y^e^ numb^r^ wilbe still augmented, to y^e^ unsupportable burthen of this comon wealth; as also it being thought a matter worthy y^e^ triall, dureing y^e^ standing of this order, to have y^e^ use of y^e^ negative vote forborne, both by magistrates & deputies,"[4] therefore it is proposed for the ensuing year that twenty deputies shall be chosen by the freemen of the various shires, six in Suffolk, six in Middlesex, and eight in Essex and Norfolk

[1] *Mass. Col. Rec.*, II, 87–8. The act was repealed 1647, but replaced by another substantially the same: *Ib.*, 210.

[2] *Mass. Col. Rec.*, II, 286–7; V, 291 (1680).

[3] Under the second charter the governor and councillors were nominees of the crown; but return of town deputies elect was made to the sheriff of each county, and by the latter to the provincial secretary: *Acts and Resolves*, I, 89, 147, 202, 315.

[4] They were to sit and vote together as was then the custom in the general court: Winthrop, *Hist. of New England*, II, 63, note.

jointly. And, to "y^e^ end y^e^ ablest gifted men may be made use of in so weighty a worke," residence in the shire on the part of the deputies is not required. The votes are to be taken in the various towns and counted in the shire town by "one or two" of each of the former chosen for the purpose. Finally the twenty delegates thus selected are to assemble at the next court of election and those "receiving the greatest number of votes, to equall y^e^ number of magistrates then chosen," are to be confirmed, and the rest dismissed.[1] This plan, however, was not accepted by the towns, and no further mention of the matter appears in the records.

VI.—Importance of the Massachusetts County as Compared with the English Shire.

The facts presented in the preceding investigation, sufficiently demonstrate, it is believed, that the county in Massachusetts was, at least, a useful and busy organism. It may be well, however, to notice somewhat more closely its relative value as compared with the contemporary institution in the mother country.

In one important particular the English county was of greater significance. The old shiremoot continued to survive; and while a mere fragment of its ancient civil jurisdiction remained, it was still the center of political life. Here the knights of the shire, as also the county coroner and verderers, were still chosen. In Massachusetts, on the other hand, the township and not the county was the unit of representation; the sheriff of the latter, at most, gaining the right to issue the precept for election and to make official return. But the extent to which the elective principle in the choice of county officers prevailed, partially balances this disadvantage. Throughout the entire colonial period the treasurer

[1] *Mass. Col. Rec.*, II, 88.

was chosen by popular vote; and in its earlier portion, the sergeant major, the various classes of commissioners, and even the associates or justices of the court, were elected in the same manner.

Again the provincial county courts were nearly if not quite as important bodies as the English quarter sessions. Their supervisory power with respect to the town communities was at least equal; their general administrative authority, particularly those functions which rendered the general sessions a powerful organ of local self-government, superior; and their jurisdiction as legal tribunals, far more comprehensive. That of the quarter sessions, it is true, extended to capital crimes, while the county courts could only try minor offences. But this superiority was greatly outweighed by their competence in all civil causes, not to mention their probate and even chancery jurisdiction.

Plainly, then, the Massachusetts shire loses little by comparison with its English prototype. But we must not close this section without emphasizing one other truth plainly disclosed by the foregoing examination. It is, that the commissioner system as employed in nominations and equalization of assessments, furnishes precedents, however indistinct, for the mixed township-county organization of the present time. And if it should be objected, that, after all, these commissioners were but town delegates, exercising their functions for convenience in the shire town: it may be answered that such is precisely the character of the modern board of supervisors: town officers, sitting together in the shire town, for the management of county affairs.

CHAPTER VIII.

RISE OF THE COUNTY IN THE MIDDLE COLONIES.

I.—The New York County.

(*a*).—*The Riding.*

Under the Dutch regime in New Netherland there was no division similar to the county: local government, such as existed, belonging to manors, villages, and chartered towns, which sustained a direct relation to the colonial authority in New Amsterdam.[1] But with the promulgation of the code of the Duke of York in 1664,[2] the history of the institution may fairly be said to begin; though there is no very clear recognition of it, save in the name "Yorkshire" bestowed upon Long Island.[3] On the other hand the old English term "riding" was adopted for the area above the town-communities, York-

[1] See Chap. III, II.

[2] Armstrong, *Introduction to Record of Upland Court*, 25–6; *Duke's Laws*, 3; Nead, *Historical Notes*, 457.

[3] Brodhead, *Hist. of New York*, II, 63, says: "Yorkshire, or Long Island, peopled chiefly by Englishmen, with Westchester and Staten Island, was erected into a shire, and like its English namesake was divided into three districts or ridings." But in a fragment of an undated letter, Col. Nicolls thus writes to the Duke: "I gave it the name of Albania, lying to the west of Hudson's River, and to Long Island the name of Yorkesh[r] as to this place, the name of N. Yorke:" O'Callaghan, *Doc. Rel. to Col. Hist. of N. Y.*, III, 105. "Precinct" was also used for the district: April 16, 1678, Andros writes:—"We have 24 townes, villages, or parishes in Six Precincts, Divisions, Rydeings, or Courts of Sessions:" *Ib.*, III, 261. Cf. Brodhead, I, 745.

shire being divided into three such judicial districts.[1] But the ridings were in fact rudimentary counties: not only did their territorial areas correspond roughly to those of counties subsequently organized,[2] but, as will appear in the sequel, the court of sessions was practically a county court, sustaining to the assizes in New York a relation similar to that occupied elsewhere by the general sessions of the peace with respect to the governor and council or other supreme court of the colony.[3]

By the Duke's Laws nearly all the functions of government, not expressly reserved to the central authority, are left to the towns or parishes. The judicial system consists of three classes of tribunals: town courts, courts of sessions, and the court of assizes. The town court is held by the constable and overseers, and exercises jurisdiction in all civil cases where the amount in controversy does not exceed five pounds. The court of sessions is held thrice a year by the justices of the peace in each riding,[4] with jurisdiction in actions of five to twenty pounds.[5] In cases of twenty pounds appeal lies to the court of assizes.

The sessions are also the medium of communication between the towns and the colonial authority. Thus we find them, at the request of the governor and council, recommending measures for the regulation of township affairs.[6]

But before resorting to the town court or the sessions, actions "of what nature soever" between neighbors are to

[1] In the *Duke's Laws*, 54, called the North, East, and West ridings of Yorkshire upon Long Island.

[2] King's, Queen's, and Suffolk: cf. Brodhead, II, 63, 386.

[3] The court of assizes was analogous to the general court or to the court of assistants in New England, and to that of the director and council in New Netherland: Chalmers, *Political Annals*, I, 575, 596: Brodhead, II, 63–4.

[4] *Duke's Laws*, 20 ff. The number of sessions was subsequently reduced to two a year: *Ib.*, 68.

[5] *Duke's Laws*, 4. Cf. O'Callaghan, *Doc. Rel. to Col. Hist. of N. Y.*, III, 188.

[6] See an example in Fernow, *Doc. Rel. to Col. Hist. of N. Y.*, XIV, 748–9.

be submitted to the arbitration of "indifferent persons" chosen by the constable or justice of the peace.[1]

The court of assizes is to be held once a year in New York by the governor and council sitting with the justices of the peace and the high sheriff; and it may hear appeals from the sessions and exercise original jurisdiction in capital offences.[2] It also possesses legislative power.[3]

There is a high sheriff for the entire jurisdiction—Yorkshire—and a marshal or under sheriff in each riding. The marshals are nominated by the sheriff, and each riding is to take its "turne in haveing a sheriffe chosen," the latter to be appointed by the governor out of a list of three nominated by the justices of the riding concerned.[4] The offices of high constable and under sheriff were ordered discontinued in 1666.[5]

(*b*).—*The County Courts of the Royal Province.*

In 1683, by an act of the first representative assembly, the jurisdiction of New York was divided into twelve counties,[6] and their boundaries were carefully defined in 1691.[7] Later the number was increased to fourteen.[8]

The judicial arrangements were similar to those of Massachusetts during the same period. For the Province there was a "supreme court" consisting of a chief justice and two associates, all appointed by the governor and holding office

[1] *Duke's Laws*, 3, 4, 51; amended, *Ib.*, 60.

[2] *Duke's Laws*, 11, 60–1, 14–15 (capital laws).

[3] *Duke's Laws*, 60 ff. For examples of orders passed: Hildreth, II, 46.

[4] *Duke's Laws*, 50.

[5] *Duke's Laws*, 68. On the Duke's Code, see Hildreth II, 45–51; Elting, *Dutch Vil. Com.*, 34 f.; Brodhead, *Hist. of N. Y.*, II, 62 ff.

[6] O'Callaghan, *Doc. Rel. to Col. Hist.*, III, 355; VI, 155; Fernow, *Ib.*, XIII, 575; Brodhead, *Hist. of New York*, II, 385.

[7] Van Schaack, *Laws of New York*, I, 7.

[8] In 1772 Albany county was divided into the counties of Albany, Tryon, and Charlotte: Van Schaack, *Laws of New York*, II, 658. Cf. O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 441, 445; Hildreth, *Hist. of U. S.*, II, 77.

during good behavior. Appeal lay to the governor and council.[1]

In the county the lowest tribunal was that of the single justice of the peace, whose jurisdiction extended to cases under five pounds, not relating to land, slander, or matters in which the crown was concerned.[2] By legislative enactment three justices had also jurisdiction in criminal causes less than grand larceny, and they could impose any penalty not extending to life and limb. Any three justices, one being of the quorum, together with five freeholders, could, without petty or grand jury, proceed against slaves in certain cases and punish even with death.[3]

Above these courts was the court of "sessions" composed of the justices of the county, with jurisdiction and powers corresponding to those of the English quarter sessions;[4] and the "inferior court of common pleas," called also the "county court," composed usually of three judges appointed by the governor and holding office during pleasure. The inferior court had "cognizance of all actions, real, personal, and mixed, when the matter in demand was above five pounds in value."[5] The clerk of the sessions was appointed by the governor and the office was "invariably connected with that of the clerk of the inferior court of common pleas in the respective counties."[6]

[1] Lodge, *Short Hist.*, 316; O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 444.

[2] So in 1774, according to Gov. Tryon's report: O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 445. Formerly the maximum was 40 shillings: *Ib.*, VI, 117 (1738); VII, 342 (1758), 426–7 (1760). In 1769 it was raised to 10£ in some cases: *Ib.*, VIII, 167. Cf. Hildreth, II, 140; Van Schaack, *Laws of New York*, II, 648, 653, 680.

[3] O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 445; Van Schaack, I, 241; II, 499.

[4] O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 445; III, 389 (Dongan's report).

[5] O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 445; if for less than twenty pounds, the suit must be commenced in the common pleas: Van Schaack, *Laws of New York*, I, 254–5; Lodge, p. 316.

[6] O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 445. On the county courts, see *Doc. Hist. of N. Y.*, I, 200–2 (1693); IV, 377, 391 (lists of county judges).

There was also in each county a court of probate held by the governor's delegate; and a "supervisor," appointed in like manner by the governor, to look after the estates of orphans and intestates.[1]

(c).—*Dual Civil Administration of the Supervisors and Justices.*

By the act of 1703, already mentioned,[2] a representative board composed of the township supervisors in each county was created. To this body was entrusted the fiscal administration, particularly the supervision of the levy and collection of the "county charge." Each year they were required to compute the charge and apportion it among the various towns, manors, or precincts of the county; and the respective quotas were then assessed and collected by the proper local officers under authority of the board.

To the supervisors, likewise, belonged the appointment of the county treasurer; and his accounts were submitted to them for approval at each annual meeting.[3] No other functions are mentioned in the statutes as belonging to the board; for the latter did not attain its full development as a supervisory authority until the present century.

It should be noted, however, that the general civil administration of the county was partly controlled by another body. Originally that administration belonged entirely to the court of sessions;[4] and after the fiscal business was placed in the hands of the supervisors, the justices continued to discharge a variety of important duties.

[1] O'Callaghan, *Doc. Hist. N. Y.*, I, 202; Van Schaack, I, 15. To the county supervisor, the officers chosen in each township to look after the estates of orphans were required to report.

[2] See Chap. III, IV.

[3] Van Schaack, *Laws of N. Y.*, I, 54–6. The treasurer was required to enter into bond with the board, with sufficient sureties, for the proper execution of his office: *Ib.*, II, 567.

[4] On the original financial duties of the sessions, see Van Schaack, *Laws of N. Y.*, I, 42–3.

Thus the orders and regulations made by overseers of highways were invalid without their approval;[1] they could hear appeals from the decisions of two justices in case of removal of paupers under the law of settlement;[2] determine the number of constables or overseers of highways which should be elected in the respective precincts;[3] and grant licenses to retailers of liquor.[4] They were also authorized to appoint inspectors of flour and repackers of beef;[5] and to nominate assessors, collectors, and supervisors, on failure of towns to elect the same.[6] Moreover a portion of the executive business of the county was transacted by one or more justices in the respective districts where they resided. Thus, in several counties, a single justice of the peace might, whenever he thought fit, order the overseer to repair any road or highway within his district.[7] In Schenectady the resident justices were empowered to appoint firemen and a night watch and establish ordinances for their government.[8] And in a number of counties, any three justices could grant exemptions from the statute for the regulation of inns and taverns.[9]

[1] Van Schaack, *Laws of N. Y.*, I, 3.

[2] Van Schaack, *Laws of N. Y.*, II, 751.

[3] So in Dutchess and Orange counties: Van Schaack, *Laws of N. Y.*, I, 245–6.

[4] So in Cumberland County: Van Schaack, *Laws of N. Y.*, II, 647.

[5] In several counties: Van Schaack, *Laws of N. Y.*, II, 609.

[6] Van Schaack, *Laws of N. Y.*, I, 56.

[7] So in Dutchess, Cumberland, Gloucester, Orange, King's, Queen's, and Richmond counties: Van Schaack, *Laws of N. Y.*, II, 664, 773, 490, 804, 782; I, 265.

[8] Van Schaack, *Laws of N. Y.*, II, 731–2.

[9] The New York laws relating to this subject are characteristic of the age. It was enacted that every inn-keeper should provide "three good spare beds, two of which to be feather beds, with good and sufficient sheeting and covering for such beds respectively, and good and sufficient stabling and provender of hay in Winter, and hay or pasturage in Summer, and grain for six horses or other cattle . . . , upon pain of forfeiting for every offence the sum of twenty shillings:" Van Schaack, *Laws of N. Y.*, II, 798. It was even forbidden to give credit to anyone, except travellers, for above six shillings: *Ib.*, I, 287.

(d).—The County as a Military and Representative unit.

The remaining functionaries of the county were the sheriff and coroner both of whom, like the clerk and justices, were nominated by the governor. All officers were paid in fees.[1]

It is worthy of note that the county in New York was the unit of representation in the assembly: according to the early English precedent two delegates were elected in each;[2] and the elections were held by the sheriff as returning officer.[3] Moreover, just as in the fourteenth and fifteenth centuries, the sheriff seems to have abused his opportunities to pack the house in the interest of party. It is complained in 1698 that four delegates were returned for New York and Orange counties without an election;[4] and in 1700 there is record of the arbitrary conduct of the sheriff in the admission of freemen to vote.[5]

In New York, as in Massachusetts, the county was used in connection with the militia; usually each had its regiment under a colonel or lieutenant colonel, commissioned by the governor.[6] Previously, under the Duke of York's administration, each town had maintained its company; and the requirements as to age, trainings, and arms were similar to those prevailing in New England.[7]

[1] O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 457.

[2] New York city returned 4 delegates; and the "borgh" of Westchester, the manors of Rensselaerswyck, Livingston, and Cortlandt, each one: O'Callaghan, *Doc. Rel. to Col. Hist.*, VIII, 443–4; Van Schaack, I, 67, 107, 129, 183.

[3] See the law of elections in Van Schaack, *Laws of New York*, I, 28–31.

[4] O'Callaghan, *Doc. Rel. to Col. Hist.*, IV, 322–3.

[5] O'Callaghan, *Doc. Rel. to Col. Hist.*, IV, 621.

[6] O'Callaghan, *Doc. Rel. to Col. Hist.*, IV, 29; VIII, 450–1. See, however, the elaborate act of 1772; Van Schaack, II, 668–74.

[7] *Duke's Laws*, 38–44; Fernow, *Doc. Rel. to Col. Hist.*, XIV, 672. Part II of Vol. XIII and Part II of Vol. XIV of *Doc. Rel. to Col. Hist. of New York*, edited by Mr. Fernow, contain a great deal of matter touching every department of government during the proprietary regime. The second volume of Brodhead's excellent *History of New York* is also indispensable; and many details will be found in Vol. I of Chalmer's *Political Annals*, I, 573 ff.

II.—The New Jersey County.

(*a*).—*Under the First Proprietors.*

The history of New Jersey during the colonial era falls naturally into three divisions: the period of the first proprietors, beginning with the grant to the Duke of York and his re-conveyance to Lords Berkeley and Carteret, in 1664, and extending to 1682; that of the twenty-four proprietors reaching from the latter date to 1702; and the period of the royal province ending with the Revolution.[1]

During the first period the history of the county begins. By the "Concessions" of 1665, the first charter or constitution of New Jersey,[2] the assembly was granted power to erect courts, limit their jurisdiction, and appoint their executive officers.[3] Accordingly in 1675, an act was passed providing for a system of judicature. The lowest tribunal was the town court for the trial of small causes under forty shillings, held "by two or three persons of whom a justice of the peace was to be one."[4] At the same time four counties were somewhat vaguely defined, each with a "county court" or "court of sessions" meeting twice a year. The judges of these courts, it is important to observe, were elected by the people of the respective districts; and their jurisdiction extended to "all causes actionable," with appeal to the "Bench" or to the "Court of Chancery:" the former being probably the provincial court of assize.[5]

[1] For the materials of this brief sketch I am chiefly indebted to Field's *Provincial Courts of New Jersey*, in *Coll. of N. J. Hist. Soc.*, Vol. III, and Prof. Scott's *Influence of the Proprietors in Founding the State of New Jersey*. Several documents contained in the first four volumes of the *New Jersey Archives* have also been of service.

[2] The text will be found in *New Jersey Archives*, I, 28–43.

[3] *New Jersey Archives*, I, 32; Field, *Provincial Courts*, 5; Scott, *Influence of Proprietors*, 7.

[4] Field, *Provincial Courts*, 7.

[5] Summarized from Field, *Provincial Courts*, 7–10.

(*b*).—*Under the Second Proprietors.*

In 1682—the first year of the second period—the judicial system of East Jersey was reconstructed. The town courts remained;[1] but now either party could demand a jury even in the smallest cases. The jurisdiction was divided into four counties,[2] each with a "court of quarter sessions" composed of the justices of the peace, three being necessary for a quorum.[3] From the quarter sessions appeal lay to the "court of common right," composed of at least six members and exercising jurisdiction in all causes, both in law and equity.[4] The office of high sheriff for each county was now first created; and subsequently that of county treasurer appears.[5]

During this period the county seems to have been of significance mainly as a judicial district. But in fiscal matters, at least, the quarter sessions discharged the functions of an administrative board. Not only was the court authorized to levy rates for the building of county prisons and village pounds, and to appoint collectors and receivers of the same; but there was instituted, by various statutes, a system, or rather habit, of co-operation between town and county in the matter of taxation and equalization of assessments, which constitutes another important precedent for the mixed township-

[1] Field, *Provincial Courts*, 11; but the lowest court seems now to have been held by a single justice of the peace—whether with or without the two others elected by the people, I am in doubt: see the letter of Lord Cornbury, in *Archives of New Jersey*, III, 4.

[2] Bergen, Essex, Middlesex, and Monmouth; Middlesex, however, was divided in 1688, a fifth county, Somerset being formed: Field, *Provincial Courts*, 11, note 3.

[3] Scott, *Influence of the Proprietors*, 21, note; Field, *Provincial Courts*, 12.

[4] This court seems to have been modelled on the courts of Scotland, through influence, probably, of Robert Barclay and other Scotch proprietors: Field, *Provincial Courts*, 12–13.

[5] Field, *Provincial Courts*, 12; Scott, *Influence of Proprietors*, 22–3, note.

county system of the present day.[1] Thus in 1686, rates for highways, laid out by county commissioners appointed by the general assembly, and taxes for all other public purposes within the limits of the town, were to be levied by four or five assessors elected by the people of each town; and the justices of the county court were authorized, with the consent of a majority of the assessors, "to approve, amend, and confirm" the same. Again in 1693, "each town in the county was empowered to choose one or more men to join with the justices of the county court, annually, to adjust the debts of the county and assess taxes for their payment."[2]

(*c*).—*Under the Royal Province.*

We now come to the third phase in the history of the New Jersey county. Two years after the union of the two colonies in the royal province, the judicial organization was brought into general harmony with that of New York and Massachusetts. By the Ordinance of Lord Cornbury, 1704, "general sessions of the peace" and "courts of common pleas," on the usual model, with appeal to the supreme court of judicature, were established; and single justices of the peace could try forty shilling cases of debt and trespass.[3] Various other ordinances were subsequently enacted, but the essential features of the system established by Lord Cornbury remained undisturbed until the Revolution.[4]

This interesting fact has been pointed out by Prof. Scott, *Influence of Proprietors*, 19–23, from whom the details here given are taken.

[2] Scott, *Influence of Proprietors*, 22.

During this period West Jersey had essentially the same county organization as the eastern division: Field, *Provincial Courts*, 24–5.

[3] See text of the ordinance of 1704 in Field, *Provincial Courts*, 256–62; also Queen Anne's Instructions to Lord Cornbury in *Archives of N. J.*, II, 506–36. For the date of Cornbury's ordinance, see Field, 42, 50.

[4] Field, *Provincial Courts*, 263 ff., gives the text of these acts. See also *Archives of N. J.*, III, 4, 72; IV, 166.

III.—The Pennsylvania County.[1]

(*a*).—*Genesis of the Organism.*

Previous to the English conquest of New Netherland, various Swedish and Dutch settlements had been established on the Delaware, particularly upon its western bank.[2] To the latter, as indeed to the whole region subsequently called Pennsylvania, the Duke of York laid claim, though the territory covered by his patent only extended to the eastern shore. For several years few changes were made in law or government, the old Dutch magistracies continuing to exist at least until 1672.[3] Little mention is made of the Duke's Laws until 1676;[4]

[1] My leading sources for the history of the county in Pennsylvania are Hazard, *Annals;* Armstrong, *Record of Upland Court*, 1676–1681, in *Memoirs of the Historical Society of Pennsylvania*, Vol. VII; *Acts of the Assembly of the Province of Pennsylvania*, Vol. I (1775); the 16 volumes of *Minutes of the Provincial Council* or *Colonial Records of Pennsylvania;* and especially the volume published in Harrisburg, 1879, under direction of the Secretary of the Commonwealth. The matter consists of several distinct divisions, cited here by their separate titles: 1. *Duke of York's Book of Laws;* 2. *Charter and Laws of the Province of Pennsylvania*, 1682–1700; 3. *Court Laws*, a collection of acts relating to the judicial system extending to May 20, 1767; 4. *Historical Notes*, by Benjamin M. Nead.

I have also received valuable aid from Gould, *Local Government in Pennsylvania: J. H. U. Studies*, Vol. I; Lewis, *The Courts of Pennsylvania in the Seventeenth Century: Pennsylvania Magazine of History and Biography*, V, 141–190; and White, *The Judiciary of Alleghany County: Pennsylvania Magazine of History and Biography*, VII, 143 ff. The histories of Proud, Gordon, and Watson have likewise been of service. See also Burnaby, *Travels*, 64; Chalmers, *Political Annals*, I, 641 ff.; Fernow, *Doc. Rel. to Col. Hist. of N. Y.*, XII, containing a collection of papers relating to the Delaware plantations; and Allinson and Penrose, *Philadelphia*, Introduction.

[2] Armstrong, *Introduction to Record of Upland Court*, 11 ff. Fernow, *Doc. Rel. to Col. Hist. of N. Y.*, Vol. XII, gives a great deal of matter relating to these early settlements. Cf. Proud, *Hist. of Pa.*, I, 115 ff.

[3] Hazard, *Annals*, 397. In 1673, after the reconquest, Dutch magistracies were restored: *Ib.*, 407; Armstrong, *Rec. of Upland Court*, 25, 31.

[4] In 1668 it was recommended that the Duke's Laws be "showed and frequently communicated to said Counsellors (of Deputy-Governor Carr) and

but on September 25, of that year they were ordered put in force by an ordinance of Governor Andros, with the important exception of the constables' courts, county rates, and "some other things peculiar to Long Island;" arbitration being recommended as a substitute for the trial of small causes by the constable and overseers.[1] But by this same ordinance higher courts, similar to the sessions held in the ridings of Yorkshire, were established. It was ordered:—

"That there bee three Courts held in y^e^ several parts of the River & bay as formerly, To witt one in New Castle, one above att Uplands another below at the Whorkil.

"That the said courts Consist of Justices of the Peace whereof three to make a Coram & to have the Power of a Court of Sessions & decide all matters under twenty pounds without Appeale, in which Court the Oldest Justice to preside, unless otherwise agreed amongst themselves." In civil cases above twenty pounds value and for crime extending to "life, Limbo or Banishment," appeal lies to the assizes.

"That all small matters under the value of five pounds may be determined by the Court without a jury Unless desired by the Partys, as also matters of Equity.

"That all necessary By lawes or Orders (not repugnant to the Lawes of the Government) made by the said Courts, bee of force and binding for the space of one whole year, in the severall places where made, They giveing an Account thereof to the Governo^r^ by the first Convenience, And that noe fines be made or imposed but by Order of Court.

"That the Severall Courts have power to regulate the Court and Office^rs^ Fees, not to exceed the Rates in the booke of Lawes, nor to bee under halfe the value therein exprest.

all others to the end that, being therewith acquainted, the practice of them may also in *convenient* time be established:" Armstrong, *Int. to Rec. of Upland Court*, 25; Hazard, *Annals*, 372. Cf. Fernow, *Doc. Rel. to Col. Hist.*, XII, 508.

[1] The text of the ordinance of 1676 will be found in Nead, *Hist. Notes*, 455–57; Armstrong, *Rec. of Upland Court*, 39–43; Hazard, *Annals*, 427–29; Fernow, *Doc. Rel. to Col. Hist.*, XII, 561–68.

"That there be a high Sheriffe for the Towne of New Castle, the River, and Bay; And that the said high Sheriffe have power to make an Under Sheriffe or Marshall being a fitt person, & for whom hee will bee responsable, to be approved by the Court, But the Sheriffe, to act as in England & according to the now practice on Long Island, . . . as a principall officer in the Execution of the Lawe, but not as a Justice of the Peace or Magistrate."

There is also to be a clerk for each court, appointed by the governor on recommendation of the justices, who is to keep the records in English.

It is noticeable that in this ordinance the term "riding" is not employed; the courts are to be held in the "several parts of the River and bay;" but they are to have "the power of a court of sessions." Another fact of the greatest importance, already referred to in connection with the ridings of Long Island, must be repeated here with greater emphasis: These tribunals are, in reality, *county* courts; and the districts or "parts" in which they are held are actually styled *counties* in the original court records.[1] Beyond question the six years intervening between 1676, and the creation of the proprietary government of William Penn, constitutes the first phase of county government in Pennsylvania.

Another thing of great interest in this connection should be carefully noted: with the ordinance of 1676, the centralization of local government in the *county*, at the expense of the *town*, begins; the town court of the Duke's code, with its right of enacting by-laws, is abolished, and the court of the county is granted legislative powers. Thus, in the very outset, one of the most remarkable features of county government in Pennsylvania—its popular and independent character—is plainly revealed.

[1] For examples, see *Record of Upland Court*, 119, 165, 171. In 1678 the bounds of New Castle and Upland *counties* were defined: Hazard, *Annals*, 459.

Records of a County Court, 1676–1681.

But the complete records of one of these primitive tribunals—that of Upland—have been preserved; and, through the munificence of the Historical Society of Pennsylvania, they are now placed within easy reach of every student.[1] Not only are they of the greatest general interest, but even a rapid examination discloses the fact, that these courts, aside from their ordinary judicial functions, were really very active popular bodies entrusted with the administration of local government.

Thus all grants of unoccupied land in each district were made by the county court, subject to the approval of the governor and council in New York;[2] and all conveyances of real estate were acknowledged in open session, and the deeds made a part of the record.[3] By the court, likewise, letters of administration were granted,[4] ways and bridges ordered constructed,[5] tobacco-inspectors appointed,[6] and taxes levied for all public purposes. The fiscal methods were similar to those employed in early Massachusetts. An example from the record may prove both interesting and instructive:

"The Court takeing into Consideracon the Levy or Pole monny for the defraying of the publicq Charges whereof the acct. was made upp the Laest Court and Calling ouer the List of the Tydable p^{r}sons in their Jurisdiction doe find that for the payment of the s^{d} Charges from Every Tydable p^{r}son must bee collected and Received the sume of twenty and six gilders to bee paid in Either of the following species (viz.) wheat at

[1] With an introduction by Mr. Armstrong, the editor.

[2] This power was given in the ordinance of 1676, and a considerable portion of the records is filled with the grants. See also numerous grants in Hazard's *Annals*, 444 ff.

[3] *Rec. of Upland Court*, 89, 90, 116, etc.

[4] *Rec. of Upland Court*, 44.

[5] *Rec. of Upland Court*, 118; Hazard, *Annals*, 460.

[6] Hazard, *Annals*, 439.

fyve—Rey and Barly att four Gilders pr scipple,[1] Indian Corne at three gilders pr scipple Tobbacco at 8 styvers pr pound porke at Eight and bacon at 16 styvers pr ℔: or Elce In wampum or skins att pryce Courrant." The high sheriff is to collect the tax by "restraint," if necessary; in the latter case, he is to "call together twoo of the neighbours and apraize the goods so strayned," returning the surplus to the owner; and he is to render account to the court.[2]

The power granted to the county courts to enact by-laws was not a dead letter, as the following examples demonstrate.

"Itt being taken in Consideracon that itt was verry necessary that a mill bee built in the Schuylkill; and there being no fitter place then the faall Called Captn hans moenses faalls; The Cort are of opinion that Either Captn hans moens, ought to build a mill there (as hee sayes that hee will) or Else suffer an other to build for the Comon good of ye parts."[3]

"Itt being Represented to ye Court by the Church Wardens of Tinnagcong and wicaco Churches that the fences about ye Church Yards, and other Church buildings are mutch out of Repair, and that some of the People members of ye sd Churches are neglective to make the same up," therefore the court empowered the churchwardens to summon the church members from time to time, when necessary, "to build make good and keepe in Repair the sd Churchyard fences as also, the church and all other the appurtenances thereof" under penalty of fifty gilders each for neglect.[4] The right of the court to appoint churchwardens is another proof of its power to order ecclesiastical affairs.[5]

But the judicial procedure of these early courts seems to

[1] *Scheepel*, Dutch for bushel: Armstrong, *Rec. of Upland Court*, 76, note.

[2] *Rec. of Upland Court*, 76–7; cf. *Ib.*, 78–80, 120, 137; Hazard, *Annals*, 446–7.

[3] *Rec. of Upland Court*, 115.

[4] *Rec. of Upland Court*, 153 (1679); Hazard, *Annals*, 467.

On the records, see also Nead, *Hist. Notes*, 462–4. Hazard, *Annals*, 429 ff., makes much use of them.

[5] Hazard, *Annals*, 438, 458, citing *New Castle Records*, 87, 88, 320.

have been crude in the extreme. The members of each chose their own president; attorneys were not allowed; and the whole administration was without symmetry.[1]

The County Reconstructed by the Proprietary.

The erection of the province in 1682 marks an epoch in the institutional history of Pennsylvania. Henceforth by the legislation of the proprietary nearly all the important functions of local government are centered in the county. The town now passes further into the background. It becomes at most a mere agent of county administration.

Soon after his arrival the proprietary divided the jurisdiction into six counties: three in the "Territories," or the region west of the Delaware, and three in the "Province;"[2] and the Territories were formally annexed to the latter by the act of union, December 7, 1682.[3]

The county thus instituted was employed for all the important purposes of self-government. It was a judicial organism, a unit of general civil administration, and a fiscal body. These departments will now be discussed in the order named.

(*b*).—*Judicial Administration.*

The lowest tribunal in the county was that of the "common peace-makers," an institution possibly suggested by the arbiters of the Duke's laws; but the latter were nominated in each particular instance by the constable or justice, while the peace-makers were local magistrates annually appointed by the county court, three for each "precinct" in the county.[4] The parties

[1] Lewis, *Courts of Pa. in the Seventeenth Century*, 144; Hazard, *Annals*, 438.

[2] Gordon, *Hist. of Pa.*, 78; *Charter and Laws of the Province*, 104; Proud, *Hist. of Pa.*, I, 201, 234.

[3] *Charter and Laws of the Province*, 104.

[4] According to Lewis, *Courts of Pa.*, 153, citing an *Address of Hon. James T. Mitchell*, 4–5; but the original text simply says—"in each precinct three

differing were required to sign a "reference and submission of their matters in controversy . . . which references being satisfied by the county court," the judgment of the peace-makers was as conclusive as a sentence of the former body, with which each decision was recorded.[1] But these courts were of short duration, being already obsolete in 1692.[2]

But side by side with the peace-makers were the justices of the peace. Actions under forty shillings for "debt or dues" could be determined by any two of them subject to the approval of the county court, which, as in the case of the peace-makers, made their judgments a part of its record. Subsequently a single justice was granted similar jurisdiction.[3] But, after 1701, his power seems to have been limited to taking acknowledgments and binding over to keep the peace.[4]

It was the county court, however, in which all the important judicial business was transacted. This was composed of all the justices of the peace in the county, sitting quarterly or more frequently when necessary. Originally the justices were appointed by the governor or his deputy from a double number elected by the general assembly;[5] but after 1701, they were nominated by commission precisely as in the mother country.[6]

The jurisdiction of the county court extended to all cases

persons shall be yearly chosen:" *Charter and Laws*, 128. But see Proud, *Hist. of Pa.*, I, 262.

[1] Act of 1683: *Charter and Laws*, 128.

[2] Lewis, *Courts of Pa.*, 153–4. According to this writer, cases were often relegated to the peace-makers from the county court; and even from the provincial council.

[3] *Charter and Laws*, 131, 219.

[4] See for example the act of 1722: *Court Laws*, 388.

[5] The elections may eventually have occurred in the county courts. It is provided in the Frame of 1682, that the "freemen" in the county courts, "when they shall be erected, and till then in the General Assembly," shall elect a double number for sheriffs, coroners, and justices: *Charter and Laws*, 97, 159.

[6] Act of Oct. 28, 1701: *Court Laws*, 311 ff. See also the commission to the justices of Chester county, *Ib.*, 382–5.

civil and criminal, personal and real, except treason, murder, and some other heinous crimes.[1] The justices were also required to sit twice a year as a court of orphans;[2] and they were given a limited equity jurisdiction.[3]

In 1701, after the return of Penn to his province, a new charter or frame of government was granted;[4] but now as in the original constitutions, the proprietary refrained from exercising the power bestowed upon him by the crown[5] of establishing courts of justice, provision therefor being left for legislative enactment.[6] From this time onward for more than twenty years the judicial system of Pennsylvania was in a most unsettled condition. Act after act was passed by the legislature only to be eventually repealed by the crown.[7]

By the first statute of the period the county court was given civil and criminal jurisdiction as before, three justices constituting a quorum; but this was repealed in council, 1705.[8] One year later, by an ordinance of Deputy-Governor Evans, the jurisdiction of the existing court was divided between two different tribunals; civil causes being transferred to the

[1] *Charter and Laws*, 225, 129, 178, 184. In 1684 jurisdiction in cases relating to titles was taken away; but it was restored in the following year: Lewis, *Courts of Pa.*, 145; *Charter and Laws*, 168, 178.

[2] *Charter and Laws*, 131, 205.

[3] For claims under ten pounds: *Charter and Laws*, 167, 184, 214, 225.

[4] Gordon, *Hist. of Pa.*, 120–22.

[5] See the charter of March 4, 1681/2: *Charter and Laws*, 83; Poore, *Charters*, II, 1509 ff.

[6] For text of the first "Frame of Government," see *Charter and Laws*, 91–99; *Pa. Col. Rec.*, I, pp. xxi–xxix; for that of 1683: *Charter and Laws*, 155–61; *Pa. Col. Rec.*, I, pp. xxxiv–xl; and for the charter of Privileges, 1701: Poore, *Charters*, II, 1536–1540; Proud, *Hist. of Pa.*, I, 443–50.

[7] By the charter a duplicate of laws was to be submitted to the privy council, within five years after passage; and if not expressly disallowed within six months thereafter, they were to remain in force. Hence statutes sometimes remained in operation several years before repeal by the council: *Charter and Laws*, 84–5.

[8] Act of Oct. 28, 1701; repealed Feb. 7, 1705: *Court Laws*, 311–19; Gordon, *Hist. of Pa.*, 141.

"county court of common pleas;" and the criminal actions, to the "court of general quarter sessions of the peace."[1] Both were held quarterly at the same place by any three justices; and from their judgments appeal lay to the supreme court consisting of three judges commissioned by the governor.

After the passage and repeal of several additional acts,[2] finally, in 1722, a law was enacted by which the judicial system was given the form which it retained, with slight modification, throughout the provincial era.[3] The two courts already named continued to exist, but the common pleas were now to be held, not by any three justices indifferently; but by judges specially commissioned by the governor. In practice, however, until 1759, certain of the county justices of the peace were usually appointed;[4] but in that year justices of the quarter sessions were prohibited from hearing common pleas, which were transferred to a court composed of five judges commissioned by the governor.[5]

Previous to 1722 the court of common pleas possessed equity jurisdiction; this was now discontinued.[6] By an act of 1713 the quarter sessions were empowered to sit as a court of orphans with jurisdiction in all questions of administration and guardianship;[7] and this function seems to have been retained until 1759, when it was transferred to the common pleas.[8]

[1] *Court Laws*, 319–23 (1706).

[2] *Court Laws*, 323 ff.

[3] *Court Laws*, 387–94; modifications, *Ib.*, 395 ff. (1727), 407 ff. (1767). However, in 1731, the act of 1727 was repealed; but in the same year that of 1722 was restored by the assembly: *Ib.*, 403, 404 f.

[4] Gordon, *Hist. of Pa.*, 546–8, 551–2, 121, 141. For many interesting details, taken from original documents, relating to primitive trials and forms of punishment, see Watson, *Annals of Philadelphia*, I, 298 ff.

[5] White, *Judiciary of Alleghany County*, 143; *Court Laws*, 405–6.

[6] Gordon, *Hist. of Pa.*, 547. But the equity jurisdiction of the inferior courts had long been unpopular: Lewis, *Courts of Pa.*, 146–7.

[7] *Court Laws*, 346.

[8] *Court Laws*, 406; White, *Judiciary of Alleghany County*, 143–4.

INDIAN COURTS.

During the early period a special procedure was devised by the assembly for the trial of causes between white men and Indians. Questions of damage, trespass, or personal injury were to be decided by "Six of the freemen of ye same county where the Abuse was Committed, and six of the Indians that are Nearest to that place." The "king to whom such Indians doth belong" was to receive notice, that he may be present to see justice done. If the Indians should refuse to submit to trial, the county court was to act.[1]

(*c*).—*General Civil Administration.*

If we now pass from the examination of the constitution of the court to a consideration of its general functions, we shall at once begin to appreciate the real importance of the county organism. In the first place, in the absence of township government, it is noticeable that the appointing and supervising power of the court is very great.[2] To it belongs the construction and repair of highways and bridges;[3] and for this purpose it may appoint at least three "overseers," who are empowered within their "respective limits" to summon the inhabitants "to come in and work," under penalty of twenty shillings for refusal.[4] Later the justices are em-

[1] *Charter and Laws*, 130 (March 1683). Compare this procedure with that of the Indian courts of early Massachusetts, already mentioned.

The character of the procedure in trials before the early county courts is discussed in an interesting manner by Lewis, *Courts of Pa.*, 145 ff.

[2] After the division of the court into two tribunals, the general business fell to the quarter sessions.

[3] The "king's highways or public roads," however, were laid out by the governor and council: Frame of Government, 1682, in *Charter and Laws*, 95, 157, 285; *Acts of the Assembly of the Province*, I, 9; *Pa. Col. Rec.*, I, 466–7; III, 105, 244.

[4] Act of March 10, 1683: *Charter and Laws*, 136.

powered to divide the county into "precincts" and appoint, annually, an "overseer of highways" for each.[1]

For the laying out of private roads or cartways, connecting with the public thoroughfares, the court, on "complaint of the inhabitants," may appoint six "housekeepers" of the neighborhood to "view the place," and should they find the demand justified, any four of the viewers are authorized to lay out the road and report their action to the court.[2]

By the latter, likewise, are laid out cartways leading to landing-places;[3] and though the right to locate ferries belongs to the assembly, the construction and the assessment of the rates therefor are entrusted to the county court.[4]

By the same authority are appointed the viewers of pipe-staves intended for transportation;[5] viewers of bread in market towns;[6] the three appraisers of property condemned on execution;[7] public packers for the inspection of meat designed for exportation;[8] viewers of fences;[9] and "beadles" in certain towns to execute the laws against cattle running at large.[10]

The court also exercises jurisdiction in controversies between master and servant, assessing damage in case of runaways, by extension of the time of service or otherwise.[11] Persons serving without indenture, if over seventeen[12] years of age, are required

[1] Act of 1700: *Acts of the Assembly of the Province*, I, 10–11.

[2] Act of 1699: *Charter and Laws*, 285–6.

[3] *Charter and Laws*, 139, 208.

[4] *Charter and Laws*, 137, 185, 236.

[5] *Charter and Laws*, 133, 206, 283.

[6] *Charter and Laws*, 135, 230.

[7] *Charters and Laws*, 172, 215, 228; *Acts of the Assembly of the Province*, I, 5.

[8] *Charter and Laws*, 239–40.

[9] *Charter and Laws*, 179, 207.

[10] *Charter and Laws*, 187, 234. There was also a "county ranger" to look after stallions and other animals: *Ib.*, 186, 219, 288. The private marks or brands of cattle were registered by the court: Lewis, *Courts of Pa.*, 145.

[11] *Charter and Laws*, 166, 213, etc.

[12] Made sixteen in 1693: *Charter and Laws*, 237.

to serve five years; if below that age, the legal term extended until majority; and it is provided that every master or mistress, within three months after the arrival of such servants, shall bring them before the county court, and "then and there oblige themselves to pay unto every servant at the expiration of their time one new sute of apparell, ten bushels of wheat or fourteen bushels of Indian corn, one ax, two howes one broad and another narrow, and a discharge from their service."[1]

The regulation of houses of entertainment gave the legislature a great deal of trouble during the colonial period. Keepers of ordinaries were licensed by the governor, and none could receive a license save those recommended by the justices of the respective counties.[2] .The early provisions touching the matter are very minute and sufficiently absurd.

"No keeper of such ordinary," runs a statute of 1684, "shall demand above seven pence half penny per meal by the head; which meal shall consist of beefe, pork or such like produce of the country; with small beer; and if a footman he shall not demand above two pence a night for his bed, and if a horseman, nothing; hee having six pence a day for his horses hay or grass." Violation of any of these rules was to be punished by a fine of five shillings; and if the house was disorderly it could be closed by the justices.[3]

The county court was also the medium of communication between the colonial authority and the people.

(*d*).—*Fiscal Administration.*

The county was the constitutional area for the levy both of the "county rate" and the "public charge."[4]

By the "great law" of 1682 it was provided that no public

[1] Act of 1683: *Charter and Laws*, 153. Each county also kept a register of servants: *Ib.*, 170.

[2] *Charter and Laws*, 286–7 (1699.)

[3] *Charter and Laws*, 172–3, 139, 195.

[4] Called also the "country rate."

tax should continue for more than one year.[1] Consequently provision for each levy was made by special enactment.

Various methods of assessment and collection were successively adopted. In 1683 the assembly provided that the tax should be laid, one half upon lands and one half upon polls, males between sixteen and sixty years of age being liable; and non-resident land owners paying one half more than residents. The quota of each county was to be "made up in open court by the respective magistrates thereof," who were empowered to assess the same on the county "according to proportion."[2]

The levy of 1693[3] is to consist of one penny in the pound clear value on land and other realty, and a poll-tax of six shillings on all freemen who have been out of servitude for six months, if not worth one hundred pounds nor otherwise rated by the act. Provided, however, that "no person or persons shall be taxed . . . who have a great charge of children and become indigent in the world and are so far in debt, that the clear value of their real and personal estate does not amount to thirty pounds." Such were the usual provisions for the public levy during the early period.

The mode of assessment prescribed by this act is characteristic. The members of the assembly, or any two of them, for each county are to call to their assistance three of the justices or other substantial freeholders, meeting in such places in the county as they may see fit, to act as a board of assessment. Warrants are then to be issued by some justice of the peace to the various constables directing them to bring before the assessors lists of taxable persons and estates. When the assessment is complete, collectors are appointed by the assessors, and all moneys collected by them are to be paid into the hands of the treasurer designated by the governor.

The tax of 1696 is to be assessed in a similar way by mem-

[1] *Charter and Laws*, 123, 203, 221.
[2] *Charter and Laws*, 146–7.
[3] *Charter and Laws*, 221 ff.

bers of the assembly and four justices or freeholders; and it is to be collected by the sheriff or such other persons as the assessors shall appoint. The money when collected is to be paid "unto James Fox of Philadelphia, merchant." The receiver is to render account to the governor and council, and the latter to the assembly.[1]

An important change in the constitution of the board of assessors was made in 1699. It was now to consist of three or more justices in each county assisted by four or more substantial freeholders—thus becoming entirely local in character.[2]

The County Rate.

Of still greater historical interest is the method of levying and assessing the county rate. The genesis of the remarkable system which prevailed throughout the provincial period may be found in the acts of 1693 and 1696. The preamble of the latter declares that—"Whereas there is a continual occasion for a Publick stock to Defray the necessary charge in each County, for the support of the poor, building or repairing of prisons, paying for salaries belonging to the Council & Assembly, paying for wolfs heads, The Judges expenses, and all just Debts, with many other necessary charges,"—therefore it is enacted that the justices in quarter sessions, assisted by the grand jury[3] and three assessors, are to "calculate the public charge of the county" and allow all just debts, dues, and accounts. The act further provides that six county assessors are to be chosen annually from the "substantial freeholders" by the freemen when assembled for the election of representatives, return thereof to be made by the sheriff to

[1] *Charter and Laws*, 253 ff.

[2] *Charter and Laws*, 280 ff.

[3] In the act of 1693 it is provided that "the Grand Jury shall present any sum necessary to be raised either for the paying any publick debt or other occasion for the publick utility of the county:" *Charter and Laws*, 233 ff.

the county clerk, who in turn is to report the same to the court at its next session. The constables within their various "limits," under a justice's warrant, are required to bring in the lists of taxable persons and estates. The collectors are nominated by the assessors; and the money is paid into the hands of a county treasurer, appointed by the same body, who is required to render account annually in open court before the justices and such others as are "willing to be present."

The tax as usual for both public and county rates, is to consist of one penny in the pound and six shillings on the poll, with exemptions similar to those already cited.[1] In Pennsylvania, as elsewhere during the early period, taxes were payable in produce.[2]

In 1724/5 appeared an elaborate statute by which the fiscal machinery of the county was still further developed on the lines already traced in the act of 1696.[3] The second article provides that, in the meeting for the choice of assemblymen, coroners, and sheriffs, there shall be elected three "commissioners" and six "assessors." The commissioners are the higher authority, performing the functions hitherto discharged by the quarter sessions. The assessors and commissioners are to hold a joint meeting annually "to calculate the public debts and charges." Precepts are then issued by the latter directed to the constables of the several townships commanding them to bring lists of all polls and property subject to taxation to the assessors, who are then to fix the rate. Furthermore the assessors are required to divide the county into districts and to appoint a collector for each. Any "agrieved" person may appeal to the commissioners, sitting as a board of equalization, the corrected returns to be delivered to the county treasurer, who is appointed by the commissioners and assessors. The commissioners are authorized to fine either the treasurer or

[1] *Charter and Laws*, 256 ff.

[2] *Charter and Laws*, 256, 259, 282, etc.

[3] See *Acts of the Assembly of the Province*, I, 131–138, for the text.

assessors for neglect of duty; and they, in turn are accountable to the quarter sessions—all fines accruing to be "added to the stock of the respective counties."

A supplementary act was passed in 1732, providing that commissioners shall not serve more than three years at one time, and that their accounts, as well as those of the treasurer and assessors, shall be submitted annually to the justices and the grand jury. The third article contains the curious provision "that the grand juries, the commissioners and assessors, with the concurrence of the justices . . . shall be the sole judges where any bridge shall be built;" and the same complex body, except the grand jury, is to let all contracts for the construction and repair of such works.[1]

No further change of importance was made until 1779, when two assistant assessors for each township are to be appointed by the board, composed as before of the three commissioners and the six assessors. These are to perform the duties thus far discharged by the constable in taking the lists of taxable persons and estates.

At the same time it was enacted that a county assessor with the two assistants should make the assessment for each district, instead of the whole board acting for the entire county. Already in 1724/5 the office of clerk of the commissioners—the prototype of the modern county clerk—had been created.[2]

(*e*).—*Self-Government of the County.*

In almost every important respect the county organization of Pennsylvania is without a parallel during the colonial era. Nowhere else is there so clear a model for the independent county system since developed in the western states. Already in the fiscal and judicial departments we have found abundant evidences of this fact; but it becomes still more apparent when

[1] *Acts of the Assembly of the Province*, I, 173–4.

[2] *Acts of the Assembly of the Province*, I, 134, 137.

we consider the remarkable extent to which popular election in the choice of officers prevailed.

In the first place, the county was the unit of representation, members of both council[1] and assembly being chosen by ballot in a general meeting of the tax-paying freemen in the "most convenient" place of the county[2] before the sheriff as returning officer;[3] and in the same assembly and in the same way, as already seen, were elected at a later time the county commissioners and the assessors. Furthermore, during the early period, the freemen "in the county court"[4] or in the general assembly were authorized to choose a "double number of persons to serve for sheriffs, justices of the peace, and coroners," out of which "respective elections and presentments" the governor was to commission the proper number. Subsequently the people lost the right of nominating justices; but at an early day it was enacted that coroners and sheriffs should be nominated in the general county meeting for choice of representatives.[5] On the other hand the clerks and prothonotaries of the county courts were appointed either by the governor or the justices;[6] and by the latter also were nominated the recorders of deeds, created by the act of 1715.[7]

[1] In the early period.

[2] So in "Frame" of 1683: *Charter and Laws*, 156.

[3] Act of Settlement, 1683; "Frame" of 1683: *Charter and Laws*, 124–5, 156, 159; Hildreth, II, 344; Lodge, *Short Hist.*, 231. In 1701 each county was to return 4, and in 1705, 8 assemblymen: *Acts of the Assembly of the Province*, I, 36; Gordon, *Hist. of Pa.*, 121.

[4] So in "Frame" of 1682: *Charter and Laws*, 97.

[5] See the Acts of 1705, 1717, 1724–5: *Acts of the Assembly of the Province*, I, 55–7, 83–4, 131–8. Eight representative districts are mentioned in the act of 1745–6: *Acts of the Assembly of the Province*, I, 201–4; but it does not appear that each district had a polling place.

[6] In 1701 a clerk of the peace for each county was nominated by the governor from a triple number returned by the justices; in 1706 the clerks were to be chosen by the respective courts; but in 1767 those of the lower tribunals were to be appointed by the governor. See Gordon, *Hist. of Pa.*, 121, 142, 548, 552.

[7] *Acts of the Assembly of the Province* I, 78–80; amended, 1775: *Ib.*, I, 520–522.

The reappearance of these democratic assemblies for the choice of county officers is something unique. In them we behold a revival of the folkmoot of the primitive shire in a form more complete than has existed anywhere else since the days of the Heptarchy. Only the ancient power of declaring *folcriht* is lacking; and this belongs to the justices in quarter sessions.

Prototype of the County-Precinct and Township-County Systems.

That the county organism of Pennsylvania for more than three-quarters of a century of the proprietary rule, affords the nearest approximation during the colonial period to the independent county or county-precinct system, so well known at the present hour, there can be little question.

On the other hand it is scarcely less interesting to know that during the later portion of that era, there was gradually developed a practice of co-operation in the administration of local affairs, which constitutes the direct model for that lower type of mixed township-county organization, now existing in an important group of western states.[1]

Thus in each township and borough two overseers of the poor were annually appointed by the magistrates. They were declared a "body politic," and, with the approval of two justices of the peace, they could levy taxes to be expended in providing for persons requiring relief. Their accounts were audited by "three freeholders" chosen for the purpose.[2]

In like manner, by an act of 1772, each town was allowed to choose one or two "supervisors" of highways who could lay a road tax, when necessary, "not exceeding nine pence in the

[1] See Chap. IV, above.

[2] Law of 1771: *Acts of the Assembly of the Province*, I, 404–14; Gordon, *Hist. of Pa.*, 552; Gould, *Local Government*, 30. In an act of 1718 "overseers of the poor of the proper township or district" are mentioned: *Acts of the Assembly of the Province*, I, 96.

pound," for opening and repairing the public roads and highways within their jurisdiction;[1] and, in addition, they possessed the usual powers of such officers.[2]

But of more historical interest was the participation of the town in the election procedure. As early as 1746 an act provides that each township, under direction of the constable or overseer of the poor and two freemen, shall ballot for an "inspector of elections." The names of those nominated are then to be returned by the constable or overseer to the "sheriff or other judge of election," who, in the presence of four freeholders of the county, shall place "all the names of the persons returned for each district, wrote on several pieces of paper, . . . into a separate box;" and in the presence of the same freeholders, an "indifferent person" is then to draw a name from each box, those whose names are drawn to constitute the board of inspectors for the year.[3] But a more elaborate statute appeared in 1766. The inspector is now to be chosen directly in each township by those entitled to vote for assemblymen; the clumsy double procedure by nomination and lot being thus dispensed with. The inspectors are to constitute a board for the county and are required to swear that they will attend "the ensuing election, during the continuance thereof, and will truly and faithfully assist the sheriff, coroner, or other judges of election, to prevent all frauds and deceits whatsoever." They are to receive the votes, each of his respective district; and for their assistance, the sheriff is required to appoint two "clerks" whose duty consists in recording the name and township or ward of each elector, and the number of votes received by each candidate. Finally, before the election begins, the sheriff or his representative calls to his aid

[1] The tax before collection, to be "allowed" by two justices.

[2] *Acts of Assembly of the Province*, I, 444–49.

[3] *Acts of the Assembly of the Province*, I, 201–2. Some provisions of the act are ambiguous; but the interpretation given in the text seems to be corroborated by the act of 1766.

four respectable freeholders or "assistant-judges;" and the latter are required to take the same oath and discharge the same duties as the inspectors.[1] It is perhaps needless to add that in this somewhat complicated procedure may be found, if not the genesis, at least a very early example, of the functions of our well known precinct and township officers—the judges and clerks of election.

The history of local institutions in the middle colonies is intrinsically interesting; but that interest is greatly enhanced when we anticipate the profound influence which those institutions were about to exert upon the political organisms of the Northwest Territory and the states beyond the Mississippi and the Missouri. To New York first and next to Pennsylvania belongs the honor of predetermining the character of local government in the West. But if, as we have seen,[2] New York was first to return to the ancient practice of township representation in the county court, it was in Pennsylvania that the capabilities of the independent county were first tested. Here the principle of election to county offices was carried farther than it was ever carried before, even in early England. New York is the parent of the supervisor system; but, with this exception, her colonial county government was nearly as dependent upon the central authority as was that of Virginia. On the other hand, Pennsylvania is the originator of the commissioner system, which though centralized still rests upon the republican foundation of popular election and local representation.

[1] *Acts of the Assembly of the Province*, I, 323–27. Cf. Chap. V, IV, (*c*).

[2] Chap. III, IV, and Chap. IV, above.

CHAPTER IX.

RISE OF THE COUNTY IN VIRGINIA AND THE SOUTH.[1]

I.—Origin and Character.

The Virginia county has received far more attention from writers than the similar institution elsewhere in the colonies; and indeed for several reasons its history is unusually important and attractive. Thus its constitution was closely modelled upon that of the contemporary English shire; it was the organism by which all the more important functions of local government were discharged; it furnished a pattern for the other southern colonies; and it has exerted a wide influence in the newer states and territories of the southwest. Moreover the Old Dominion, in population, wealth, and social prestige, held a foremost place among the English provinces.

But it is easy institutionally to exaggerate the importance

[1] My principal authorities are Hening, *Statutes at Large*, 13 vols.; Palmer and McRae's *Calendar of Virginia State Papers; An Account of Virginia*, in 1 *Mass. Hist. Collections*, V; Jefferson, *Notes on Virginia;* Beverley, *History of Virginia; Proceedings of The First Assembly of Virginia*, 1619, in *Col. Rec. of Va.*, Richmond, 1874; Stith, *Hist. of Virginia; Lawes Diuine, Morall, and Martiall*, in Force's *Tracts*, III; Neill, *Virginia Carolorum;* Burnaby, *Travels*, 16 ff.

I am much indebted to Mr. Ingle's *Local Institutions of Virginia: J. H. U. Studies*, III, and to Dr. Channing's *Town and County Government: J. H. U. Studies*, II. The histories of Burk, Hildreth, Campbell, Lodge, and Doyle have also afforded some assistance. For historical sketches of the various counties, see Howe's *Hist. Collections of Virginia.*

of all these considerations. The Virginia county was not so independent as that of Pennsylvania; for, on the one hand, it was less democratic in the choice of officers; and, on the other, the functions of local government were to some extent shared with the parish from the beginning. Again, while it may have been the most complete realization in this country of the parent institution, still it possessed various unique features; and besides, the county organization of Pennsylvania, New York, or even of Massachusetts, retained the broad outlines of the English model. In addition to all this, it is beyond question, that the two systems of county government now existing in the northwestern states, were suggested, not so much by that of the South as by those of the Middle Provinces; though, in no section, did the people ever become entirely unfamiliar with the general conception of county organization.

Nevertheless the Virginia county furnishes a most interesting and profitable study; in fact, scarcely from any other single point of view can so satisfactory an insight into the every-day life of the people be obtained.

The institution was a natural growth. The followers of Smith, like those of Bradford or Winthrop, settled of necessity in village communities. For a time the "city" promised to be the counterpart of the northern "town." But a number of causes, chiefly economic, determined a different development. The customs of entail and primogeniture, the rise of negro slavery, the numerous watercourses, and the predilection for large estates on the part of the principal settlers, all these combined to produce plantation, rather than village life.

Within a very few years from the original occupation, the rudimentary cities had begun to decay—to dissolve or expand into the county.[1] At first "hundred," "plantation," or "guift" was the name given to the territorial unit. Not until 1634 was the colony divided into "shires," eight in number, to be

[1] This point is brought out by Ingle, *Local Institutions of Va.*, 81.

"governed as the shires in England."[1] Soon after, in the records, the term "county" supersedes the more ancient name.[2] The number of counties was gradually increased, until in 1680 there were twenty;[3] in 1705, twenty-nine;[4] and in 1781, seventy-four.[5]

We now proceed, without further preface, to examine the county constitution, adopting much the same arrangement as hitherto.

II.—Evolution of the County Court.

(*a*)—*Development of the Organization.*

The growth of the local judiciary extends over a number of years before the system reaches its permanent form. During the early period, the only tribunal which existed in the province was that of the governor and council at Jamestown. This court at first was held quarterly,[6] but later the sessions were reduced to three,[7] and then two,[8] each year; and on account of the inconsistency of retaining the old name, it was ordered by the assembly in 1661/2 that they be called "general courts."[9]

In 1624 courts "to be kept once a month in the corporations of Charles City and Elizabeth City" were erected.[10] These, like the inferior tribunals of 1636 in Massachusetts, were the

[1] Hening, I, 224.

[2] In minutes of the Assembly for 1639/40; but these are a summary made in the following century: Hening, I, 224, note, 228. The term is next used in 1642/3: Hening, I, 238 f.

[3] As appears from a list of counties, where towns and store-houses are to be established: Hening, II, 472–3.

[4] Beverley, *Hist. of Va.*, 192.

[5] Jefferson, *Notes on Va.*, 125–6, 148.

[6] Hening, I, 145, note, 174, 187, 270.

[7] Hening, I, 524 (1658/9).

[8] Hening, III, 10 (1684); Beverley, *Hist. of Va.*, 206.

[9] Hening, II, 58.

[10] Extended in 1631/2 to other places in "remote parts:" Hening, I, 168.

germs of the county courts. They had jurisdiction in suits "not exceeding one hundred pounds of tobacco" and in petty offences, and they were held by the commanders of the respective places and such others as the governor saw fit to commission, the former being of the quorum.[1] In June the jurisdiction was extended to cases involving less than 1600 pounds of tobacco; and in March, 1643, the name "county courts" was substituted for "monthly courts." They were now to be held six times a year in each of the ten counties; and it was also provided at this time that actions for less than twenty shillings or two hundred pounds of tobacco[2] should be tried by a single commissioner.[3] The commissioners were afterwards called "justices"[4] and "magistrates."[5]

In 1661 the number of justices was fixed at eight including the sheriff;[6] but the law does not seem to have been long observed,[7] and the limit was removed by the act of 1748.[8] The justices were appointed by the governor; but in practice they usually nominated candidates who then received the governor's commission; thus the county court, like the vestry, became in effect a close corporation composed of the leading gentry of the county.[9] The commission for each county was

[1] Hening, I, 125. See the form of commission in *Ib.*, 132 (1628/9), 168–9 (1631/2). One other besides the commander was usually of the quorum: Neill, *Virginia Carolorum*, 90–1.

[2] Made 350 pounds in 1657/8; and two commissioners could try cases of 1000 pounds: Hening, I, 435. Cf. *Ib.*, II, 72; V, 491.

[3] Hening, I, 272–3; Ingle, *Local Inst.*, 89; Channing, *Town and County Govt.*, 44.

[4] In 1661/2: Hening, II, 70, note.

[5] *Cal. Va. State Papers*, I, 263.

[6] Hening, II, 21. The reason assigned is that "the great number of commissioners in each county hath rendered the place contemptible and raysed factions."

[7] In Beverley's time, 1705, the court was held by "eight or more gentlemen:" *Hist. of Va.*, 208.

[8] Hening, V, 489.

[9] However, in 1652, it was enacted that the assembly should appoint the commissioners: Hening, I, 372.

ordinarily renewed every year, the main object being to increase the governor's fees and patronage.[1]

The court usually met monthly in the county town, four justices being necessary for a legal session, one of whom must be of the quorum.[2] It had jurisdiction in criminal actions not extending to life and limb,[3] and in civil suits involving over twenty shillings, being final for sums under sixteen pounds sterling.[4] It could also try equity cases,[5] hear appeals from the single justice,[6] and it had charge of probate and administration.[7] Business in the county court seems often to have been loosely administered, the justices being sometimes dilatory and incompetent.[8]

(*b*).—*The Officers.*

The county court appointed its own clerk who, as elsewhere, performed also the usual duties of county recorder.[9] The sheriff was the executive officer, and one of the most important functionaries of the county. Originally, by a curi-

[1] "He renews that commission commonly each year, for that brings new fees, and likewise gives him an opportunity to admit into it new favorites, and exclude others that have not been so zealous in his service: *An Account of Va.*: 1 *Mass. Hist. Coll.*, V, 149.

[2] Beverley, *Hist. of Va.*, 208 f.; see various acts in Hening, especially that of 1748, Vol. V, 489.

[3] But in 1655/6 it was ordered that criminal suits should be tried in the quarter courts or in the assembly—"which of them should happen first:" Hening, I, 397–8.

[4] But in 1748 the lower limit was fixed at 25 shillings: Hening, V, 491.

[5] Hening, I, 303; V, 491.

[6] Hening, I, 435.

[7] Hening, I, 302–3, 447.

[8] See complaints that courts are not properly kept, in *Calendar Va. State Papers*, I, 106, 195; *An Account of Va.*: 1 *Mass. Hist. Col.*, V, 150. On the county, see also Campbell, *History of Va.*, 352–3; Hildreth, I, 337; Lodge, *Short History*, 48–9.

[9] In 1645 the appointment was vested in the governor; but in 1657/8 the court recovered the right: Hening, I, 305, 448.

ous arrangement, he himself was a member of the court: the person heading the list of justices first administered the office, and the others "successively as they held their places in the commission, every one an whole year and no longer."[1] Later he was appointed by the governor from a triple number of justices nominated by the county court.[2]

This plan by which the executive officer became a member of the court, has few precedents,[3] but may be regarded as a revival of the sheriff's ancient right to preside in the shire-moot, though it here appears in connection with the body representing the English quarter sessions.

The more important general functions of the sheriff will be noticed further on.

III.—Representation and Civil Administration.

(*a*).—*Election of Burgesses.*

In Virginia, as in the Middle Colonies, the county was the unit of representation. The number of burgesses which each might return was not, at first, definitely prescribed;[4] but in 1645, it was restricted to four, except for the county of James City, which was allowed five besides one for the town itself.[5] Finally in 1660 the number of burgesses was fixed at two for each county and one for Jamestown—the same privilege being subsequently conferred upon Norfolk and Williamsburg.[6]

[1] Hening, II, 21, 78, 353.

[2] Hening III, 246 (1705); V, 515 (1748); *Calendar of Va. State Papers*, I, 98 (1706).

[3] It was the same on Long Island, according to *Duke's Laws*, 65; but in practice, doubtless, in both places the functions of the sheriff were largely restricted to his proper executive duties. Aug. 4, 1676, it was ordered that he should no longer sit as justice in the Duke's jurisdiction: Fernow, *Doc. Rel. to Col. Hist.*, XII, 553.

[4] However in the Assembly of 1619 each district returned two delegates.

[5] Hening, I, 299–300.

[6] Hening, II, 20; Ingle, *Local Inst.*, 79.

But in the early period the representative system was not symmetrical: certain parishes by special act of the assembly being authorized to return delegates; and the vestry could levy a tax for their wages. In these exceptional cases the sheriff was required to hold a special election within the borders of the parish.[1]

The elections were held at the court-house before the sheriff as returning officer; and each elector gave in his vote "upon view," or *viva voce* if a "poll" were demanded.[2]

In early days the right of suffrage was given alternately to freemen, housekeepers and freeholders,[3] housekeepers, and finally to freeholders only.[4] At the Revolution the freehold right consisted of an "estate for life in 100 acres of uninhabited land, or 25 acres with a house on it, or in a house and lot in some town."[5]

(*b*).—*General Functions.*

The care and construction of bridges and highways belonged to the county court; and for this purpose the county was divided into "walks" or "precincts" for each of which the court appointed annually a "surveyor of highways."[6] In like manner the county was divided into "precincts" for the constables or "headboroughs," who were also appointed by the justices.[7] Similarly, in early times, the parishes were laid out

[1] Hening, I, 250, 277, 421, 545.

[2] Hildreth, II, 238; Hening, I, 411 (1655), 475 (1657/8): return was to be made by "subscription of the major part of the hands of the electors." This will remind the reader of the early "indentures." Cf. Cox, *Antient Par. Elections*, 108; Stubbs, III, 408–11. For an interesting account of the procedure at elections, see Ingle, *Local Inst.*, 80.

[3] Hening, I, 403 (freemen), 412 (housekeepers), 475 (freemen); II, 280 (freeholders and housekeepers); Neill, *Virginia Carolorum*, 242, 330.

[4] Hening, II, 425 (1677).

[5] Jefferson, *Notes on Va.*, 161. Cf. Ingle, *Local Inst.*, 80, note.

[6] Jefferson, *Notes on Va.*, 209; Hening, I, 199, 436.

[7] Beverley, *Hist. of Va.*, 199; Burk, *Hist. of Va.*, II, App., p. 21; Ingle, *Local Inst.*, 83, 92.

by the county court; but later this was effected by special acts of the assembly.[1]

The county court had charge of ferries, prescribing the rates and regulations.[2] It could also offer rewards for killing wolves;[3] appoint tobacco viewers;[4] admit attorneys to practice;[5] license ordinaries, and limit the charges of the same.[6]

Besides the sheriff and the clerk, the remaining officers of the county were the coroner, the land surveyor, and the lieutenant. The coroners, two or more for each parish, were appointed by the governor; but in their absence justices of the peace could act.[7] In 1693 the right of appointing the surveyor general of the province was vested in the president of William and Mary College, and the local surveyors were nominated either by the latter or by the surveyor general.[8] The duties of the county lieutenant will be noticed hereafter.

(c).—*Survival of Legislative Power and Local Representation.*

The government of the Virginia county, as thus far detailed, was highly centralized. All of its important officers were appointed by the governor; while the inferior agents of local administration were chosen by these nominees. In the court was placed the entire government of the county, save the few independent secular functions discharged by the vestry and

[1] Hening, I, 469; V, 75, 96, 267, etc.

[2] Hening, I, 348, 411. But, later, ferries were established and their fees regulated by the assembly: *Ib.*, IV, 179; V, 66, 364, etc.

[3] Hening, I, 328, 456.

[4] Hening, III, 436.

[5] Hening, I, 275, 419; VI, 140 ff.

[6] Hening, I, 411, 522.

[7] Beverley, *Hist. of Va.*, 199; Hening, II, 325, 419.

[8] Beverley, *Hist. of Va.*, 198. See Dr. H. B. Adams' monograph, *Hist. of W. and M. College*, 15 ff.; Cooke, *Hist. of Va.*, 305; Ingle, *Local Inst.*, 93. In the earlier period the local surveyors were appointed by the commissioners of the county court: Hening, I, 404.

churchwardens.[1] The principle of popular election appears only in the choice of burgesses.

But there was one democratic feature of the county organism of considerable interest from an historical point of view. The court was not only authorized to establish its own rules; but in 1662 *both* parishes and counties were granted "liberty to make laws for themselves," when approved by a majority vote.[2] This act was thought to be "too generall," and therefore in 1679 a new law was passed providing that each parish should choose two delegates, "at such time and place as by the county court shall be appointed," return of the election to be made by the churchwardens; and the delegates "shall sitt in the severall county courts and have their equall votes with the severall justices for the makeing of lawes," the latter to be binding upon all inhabitants of the county. If the county consisted of but a single parish, four representatives were allowed; and likewise for every "chapel of ease" in greater parishes one delegate could be chosen.[3] It is very doubtful, however, whether much practical use was ever made of this institution; but its mere appearance in this country is of peculiar interest. For the chief characteristic of the primitive shire as a self-governing body is thus revived: the right of independent legislation exercised in a representative assembly of the freemen.[4]

Another ancient privilege of the shire, that of free access to the sovereign, found a parallel in Virginia. It was usual, after the choice of burgesses, for the county court to sit as a "court of claims;" and such claims as were audited and approved and any complaints or *gravamina* which might be

[1] See above Chap. III, vi.

[2] Hening, II, 171–2. In 1655/6 Northampton county had been given the same right: *Ib.*, I, 396.

[3] Hening, II, 441. Cf. Ingle, *Local Inst.*, 93.

[4] This arrangement seems to be without parallel in colonial history; compare it, however, with the restricted right of enacting by-laws possessed by the justices of the county courts on the Delaware, under the Duke of York.

presented, were sent to the assembly by the burgesses elect, and there referred to the proper committees.[1]

IV.—Fiscal Administration.

Besides the quit-rents and customs, with which we are not here concerned, there were in Virginia three different taxes to which all heads of families were bound to contribute. These were the parish, county, and public levies. Each was laid solely on polls,[2] the only land-tax being the royal quit-rents of two shillings on every hundred acres.[3]

The list of "tithables" included all slaves, male and female, and all white men above the age of sixteen; but children and white women were exempt.[4] In early days various expedients were adopted for making the lists of tithables. The tax of 1629, of five pounds of tobacco per capita, was to be brought to the "houses of the burgesses" by the "masters" of families, and in default any burgess could levy the same by distress.[5] In 1645 and 1646 the lists were to be made by "commissioners" appointed by the county courts.[6] After the revival of the poll-tax, in 1649, masters of families were required to bring in their own lists to the county court;[7] and in 1659 the sheriff

[1] *An Account of Va.*: 1 *Mass. Hist. Coll.*, V, 147.

[2] But in 1645 the "anncient" poll-tax was abolished and a tax on land and other property substituted, cattle being appraised at so much a head according to age; but this law was abrogated and the former method restored in 1648: Hening, I, 305, 356.

[3] "Their parish, county, and public taxes in Virginia have always been laid in this fashion, viz., not upon land, houses, stocks of horses, cattle, trade, etc., but the number of tithables. . . Their servants and slaves being the most considerable parts of their estate, are the only rule they observe in laying the levy." *An Account of Va.*: 1 *Mass. Hist. Coll.*, V. 156.

[4] Beverley, *Hist. of Va.*, 203; Hening, I, 361, 454. Indian woman servants were also listed: *Ib.*, II, 492 (1682); *An Account of Va.*: 1 *Mass. Hist. Coll.*, V, 154. Even white women laboring in the field were sometimes assessed.

[5] Hening, I, 143.

[6] Hening, I, 306, 329.

[7] Hening, I, 361.

was ordered to take them "as formerly hath been accustomed."[1] Finally a definite plan was adopted: the county was divided by the court into a certain number of tax "precincts," and a justice was designated to take the lists for each.[2]

The procedure in making a levy, at the close of the seventeenth century, is thus described by a contemporary writer:

"There is a certain time every year, viz. about the beginning of June, before the 10th day of it, when all masters of families are obliged to give in a list of all the tithable persons within their several families, to a certain justice of the peace in that district where they live, who is authorized by the county court to take it, and is obliged to give it in, at the next county court, where it is affixed at the court door, to the end, that if any tithables, in any family, are not listed, they may be discovered and found out; for it is every man's interest to have the list of tithables as full as possible, it being so much ease to him in his own levy, as will appear by and by: and there is a great penalty upon every master of a family that conceals a tithable, viz. the loss of a slave, if he or she is a slave that is concealed, and the penalty of 2000 pounds of tobacco if it is a free man or woman. The list of tithables being thus exactly taken out of them, the parish, county and public levy are raised in this manner.

"For the parish levy, the vestry of every parish meet usually some time about the month of October (when the tobacco is ready), and making a computation of all the parish debts for that year, viz. so much for the minister's salary, so much for the clerk, so much for building, reparations and ornaments of the church, so much for the poor etc. and adding 8 per cent. to that part of it which is to be laid with cask, and 5 per cent. in some places 10, for collection, they divide the whole sum of

[1] Hening, I, 521.

[2] Hening, II, 19, 83 (acts of 1660, 1661/2). The augmentation of taxes through fraud of the sheriff, is assigned as a reason for the innovation.

tobacco (for all levies are paid in tobacco), by the number of tithables in their parish list, which the church wardens are obliged, for the above salary, to collect from the several masters of families and pay away to the several persons to whom it is due. At the easter vestry the church wardens make up their accounts with the vestry.

"The same method is observed for the county levy, viz. the justices of the peace meet, and compute all the county debts, viz. the charge of building and repairing their court house and prison, keeping up their bridges, causeways, and ferry-boats, the charge of coroners' inquests, and especially (which is the greatest charge of all), the allowance to their two burgesses at the General Assembly, if there has been any that year, which allowance is 120 pounds of tobacco and cask per diem to each of them, besides extraordinaries for going and coming."[1]

In like manner the estimate of the public levy was made by a committee of the general assembly, the proper amount being added to that of each county.

The sheriff was the fiscal officer; and it is interesting to see the function which constituted the chief business of the Norman vicecomes again coming into so great prominence. He was not only collector of both public and county levies, and sometimes that of the parish; but he was custodian of the tobacco received, paying it out on the proper warrant and rendering account therefor to the county or provincial court. He was, in short, *ex officio* county treasurer—there being no officer bearing that name in Virginia.[2]

[1] *An Account of Va.*: 1 *Mass. Hist. Coll.*, V, 154–5.

[2] *An Account of Va.*: 1 *Mass. Hist. Coll.*, V, 154, 157. The sheriff also collected the quit-rents: Hening, II, 83. His fees were, of course, payable in tobacco: See lists in *Cal. of Va. State Papers*, I, 142, and Hening, II, 146. *Calendar*, I, 146, contains the justices' warrant for collection of a county levy. On the sheriff's fiscal duties, see further Hening, I, 259, 284, 442, etc.

V.—Military Administration.

The county was also employed as the sole unit of the militia organization. In New England and New York, as already seen, the train-bands of the several towns united to form a regiment for the shire. In Virginia the process was precisely opposite: the entire body of foot or horse being divided into convenient companies or troops by the principal militia officer of the county, under such rules as the governor—who was commander-in-chief of all the troops of the province—should prescribe.[1] An example of such regulations is given by Beverley. "Whereas," he says, "by the practice of former times upon the militia law, several people were obliged to travel sometimes thirty or forty miles to a private muster of a troop or company, which was very burdensome to some, more than others, to answer only to the same duty; this governor[2] . . . so contrived, by dividing the counties into several cantons or military districts, forming the troops and companies to each canton, and appointing the muster fields in the center of each, that now throughout the whole country, none are obliged to travel above ten miles to a private muster, and yet the law put in due execution."[3]

The chief command of the militia and the general administration of the military laws, in each county, was vested in the "commander,"[4] or as he was subsequently styled, the "county lieutenant," appointed by the governor.[5] The latter is of peculiar interest as being the representative of the lord lieutenant of the English shire, thus keeping up in this country

[1] See, for example, the militia act of 1705: Hening, III, 337.

[2] Nicholson.

[3] *Hist. of Va.*, 218.

[4] Hening, I, 125, 127, 140, 193, 174–5, 200.

[5] Hening, I, 224 (1634). He was to be "appointed the same as in England."

the continuity in functions of the Saxon ealdorman and the more ancient princeps.[1]

The commander was the constitutive officer of the monthly courts established in 1624, being "of the quorum;" and, as a member of the council, he was a judge of the chief tribunal of the province.[2] In early days he was entrusted with various executive duties; such as the enforcement of the tobacco laws[3] and those against drunkeness and swearing.[4] He could also, in his discretion, imprison persons of "quality" found delinquent in their duties, such "being not fitt to undergoe corporal punishment;" but the graver offences were reserved for the monthly court. He was likewise required, with others, to take care "that the people doe repair to their churches on the Saboth day," and that it "be not ordinarily profaned by workeing or by iournyeing from place to place."[5]

But his function as military chief of the county was most important, though it is clear from the form of commission that he was intended to fill the place of a governor's deputy. "Whereas," runs the commission to Edward Waters as commander of the "precincts" of Elizabeth City, "the affaires of this colony doe necessarily require that men of sufficiency and experience bee appoynted to command and governe the several

[1] The charter of 1609 seems to show an intention on the part of the crown to erect the colony of Virginia into a county under the governor as lieutenant. It provides "that such principal governor as from time to time shall duly and lawfully be authorized and appointed in manner and form in these presents heretofore expressed, shall have full power and authority, to use and exercise martial law in cases of rebellion or mutiny, in as large and ample manner as our lieutenants in our counties within this our realm of England have or ought to have by force of their commissions of lieutenancy:" Poore, *Charters*, II, 1901; cf. Ingle, *Local Inst.*, 75.

[2] These judicial functions are analogous to those of the lord lieutenant as principal justice named in the commission of the peace.

[3] Hening, I, 152, 165.

[4] Hening, I, 126.

[5] Hening, I, 144. On the early sabbath laws of Virginia, see *Lawes Diuine, Morall, and Martiall:* Force's *Tracts*, III; Doyle, *English Colonies*, I, 138 ff.

plantations and inhabitants within the same, both for the better order of government in the conservation of the peace and in the execution of such orders and directions as from tyme to tyme shall be directed unto them, as alsoe for the preventing and avoyding of such mischiefes as may happen unto us by the intrusions and practizes of the Indians our irreconcileable enemies . . . I . . . constitute and appoynt him . . . commander."[1] In later times, however, the lieutenant's functions were restricted almost entirely to matters directly connected with his military command.[2]

The lieutenant was first in rank and dignity among the county magnates. When a member of the council, he bore the honorary title of colonel;[3] otherwise that of major;[4] but the regiments of horse and foot in each county had their separate colonels, subordinate to the lieutenant.[5] All the higher militia officers were appointed by the governor, but those of inferior rank, by the captains of companies.[6] General musters of the regiment were held annually, and company trainings usually once a month.[7] Courts martial, under presidency of the lieutenant, were held by the officers; and the fines adjudged were levied by the sheriff.

Some of the military regulations are of interest. All white males, for example, between sixteen and sixty years of age,

[1] Hening, I, 131–2 (1628/9).

[2] This is shown in the commission of the lieutenant: see the form in *Cal. Va. State Papers*, I, 270 (1775). On his duties, see Hening, IV, 198; V, 91, 19; VII, 30.

[3] See Ingle, *Local Inst.*, 85.

[4] "But if the command of any county lies very remote from all the counsellors, then he gives that to some other person, under the title of major:" *An account of Va.*: 1 *Mass. Hist. Coll.*, V, 161.

[5] The lieutenant received 70 pounds of tobacco a day, when the colonel of horse received 60, and the colonel of foot, 50: see lists of wages, Hening, III, 365; IV, 200, etc.

[6] Hening, III, 340 (1705). But by Bacon's laws, company officers were elective: *Ib.*, II, 348.

[7] Sometimes, however, once in two months or oftener: Hening, V, 91.

with a few exceptions, were enrolled by the lieutenant,[1] the latter during the early period, serving also as a general census taker.[2] Alarms were sounded by discharge of guns, and all were required to respond. The temper of the Virginians after the massacre of 1622 is revealed in an order of March, 1624, "that at the beginning of July next the inhabitants of every corporation shall fall upon their adjoining salvages as we did the last yeare;"[3] and we catch a glimpse of the social condition of the colony in an act of 1656, providing that, since the only means of giving warnings of danger from Indians "is by allarms of which no certainty can be had in respect of the frequent shooting of gunns in drinking, whereby they proclaim, and as it were, justifie that beastly vice spending much powder in vaine, that might be reserved against the comon enemie," therefore the discharge of guns "at drinkeing (marriages and ffuneralls onely excepted)" shall be forbidden under penalty of one hundred pounds of tobacco for each offence.[4]

Every man was required to supply his own arms and ammunition, as specified by law; and if not provided, the county court could furnish them, and cause the value to be collected by the sheriff like other fines.[5]

Troops of twelve or more horsemen, called "rangers," were maintained in constant pay as outposts at the heads of the four great rivers, to guard against surprise by the Indians.[6]

A very large space in Hening is devoted to the numerous militia acts, which are much alike save in matters of detail. Those of the eighteenth century generally contain a clause

[1] Hening, III, 335–7, etc.

[2] Hening, I, 174–5.

[3] Hening, I, 128.

[4] Hening, I, 401–2.

[5] Hening, II, 304–5 (1673).

[6] On the rangers much will be found in the *Cal. of Va. State Papers*, I, 32, 38, 44, 50, 62, 189, etc.; Hening, II, 433; VI, 465; VII, 76, etc.; *An Account of Va.*: 1 *Mass. Hist. Coll.*, V, 161. Beverley, *Hist. of Va.*, 218, says they had been done away within his day; but they were afterwards employed.

authorizing the lieutenant or chief military officer of the county to appoint a certain number of the militiamen, usually four or less, as "patrollers" to "visit all negroe quarters and other places suspected of entertaining unlawful assemblies of slaves, servants, or other disorderly persons," to seize those "strolling about from one plantation to another without a pass," and to "carry them before the next justice of the peace" who may cause them severally to receive not to exceed twenty lashes on "his or her bare back well laid on."[1] The rise of this institution marks the growth of the great social evil of Virginia.

VI.—County Government in Maryland.

The county organization of Virginia was typical of that which prevailed throughout the South; but nowhere else in those colonies was it so strong or of such relative importance. This is especially true of the county in Maryland during the entire provincial era.[2] In early times nearly all the functions of local government, which the proprietary or the assembly saw fit to entrust to the people, were bestowed upon the city, the manor, and, particularly, upon the hundred. The latter, as already stated,[3] was the unit of the fiscal and military organizations; and before the Commonwealth, it was also the area of representation.

At first the county seems to have been used solely as a judicial district;[4] but from the Revolution onward it began to

[1] Hening, VII, 104–5 (1757); IV, 202; V, 19; VI, 421.

[2] The Maryland county has been thoroughly treated from the sources in Dr. Wilhelm's *Local Inst. of Maryland*, to which the reader is referred for a detailed account. For South Carolina, see Ramage, *Local Government and Free Schools in S. C.: Studies*, Vol. I. And for the rise of county institutions in North Carolina, see Chap. III, VII, (*c*).

[3] See above, Chap. V, IV, (*b*).

[4] For a few details as to the early county court, see *Archives of Md.* (1637–64), pp. 47, 148, 149, 184; Bozman, *Hist. of Md.*, II, 138, 128 ff. Cf. Wilhelm, *Local Inst.*, p. 79 ff.

gain in importance. Burgesses were now chosen by the electors of the county in the presence of the sheriff as returning officer. The court, composed of "commissioners" appointed by the governor, acquired a limited jurisdiction in civil, criminal, and equity causes; and it also had charge of orphans and their estates. It could levy county taxes, assess parish rates, fix parish boundaries, appoint road overseers, and constables in the hundreds, and exercise various other administrative functions.[1] But there is no trace of legislative power, though laws of the assembly were proclaimed by the sheriff before the court.

The executive officer of the county was the sheriff, or, as originally called, the marshal, who was appointed by the governor or proprietary.[2] Besides his ordinary duties as servant of the court, he was tax collector and, until 1666, performed the functions of coroner.[3] In that year the lieutenant general was empowered to appoint as many coroners in each county as he saw fit, and their commissions were to be as "neere as may be" in accordance with the laws of England.[4]

Besides the clerk of the court, each county had also a "commander" whose functions were probably intended to be similar to those of the commander in Virginia; but the office seems to have been, in fact, of far less importance and it is little noticed in the records.[5]

[1] On these functions see Bacon, *Laws of Md.*, 1692, c. II (parish boundaries); 1702 (parish rates); 1704, c. XXI, 3 (road overseers); 1704, c. XXXIV, 1 (county charge); 1715, c. XV (appointment of constables). Cf. Wilhelm, *Local Inst.*, 86.

[2] However in 1662 the Virginia plan was adopted: appointment by the governor from three nominees of the county commissioners: *Archives of Md.*, p. 451. The act was repealed 1675: Wilhelm, *Local Inst.*, 76. In 1691 the crown assumed the right of appointment which it retained until 1715.

[3] But in 1640, Jno. Robinson, high constable of St. Clement's hundred, was made coroner: *Council Proceedings* (1636–47), p. 91, 85.

[4] *Archives*, pp. 130–1.

[5] See *Council Proceedings* (1636–47), pp. 132, 134, 146, for duties of commander of St. Mary's county; also *Archives of Md.*, 1644, p. 202. The commander of Kent had more important duties. Bozman, II, 614, gives the form of commission.

VII.—The Provincial County Courts a Survival of the Quarter Sessions and not of the Shiremoot.

We have now completed our examination of the different forms of county government which existed in the American provinces. In each instance we have found that the most prominent feature of the constitution, nay, the very heart of the organism, was the county court; and the latter everywhere, when it reached its full development, approximated to the same general type. However it might differ in powers and functions, as the organ of self-government or civil administration, in character it was the same. Whether held by associates and magistrates, by commissioners, or justices of the peace; whether styled quarter courts, county courts, or general sessions, they were always essentially a reproduction on American soil of the English quarter sessions—a name which they also bore.

This fact so patent to the thoughtful observer should go without saying, were it not a common practice to speak of the provincial county court as if it represented the English institution of the same name. But it should not be forgotten that in the English county, since the reign of Edward III, there have always existed, side by side, two bodies: a newer tribunal composed of the peace magistrates, exercising jurisdiction in criminal causes and entrusted with the general administration of the laws; and an elder tribunal, composed of the freemen of the district meeting in presence of the sheriff to choose coroner, verderer, and knights of shire, or to declare folkright in certain cases. The former is the quarter sessions of the peace; the latter, the county court—an outgrowth of the ancient scirgemot.

The provincial courts were in form justices' tribunals; but in functions they were something more. It can not be denied that they possessed certain attributes of the shiremoot, and in a fuller sense than the English county court since the Norman Conquest: such were the powers of local self-government, the

general functions of civil administration, the right of enacting by-laws, and the control of the parish or township—of which, here and there, we have found so many illustrations. The explanation of these peculiarities is, however, not far to seek. They are but the characteristics of the ancient and more popular body transferred or attached to the other. And this is just what, historically, was to be expected. From the very first, as already pointed out,[1] the quarter sessions began to absorb the judicial functions of the county court; and before the seventeenth century, these had been reduced to a shadow. Now, in the Colonies, all the forces of local institutions were quickened and expanded. In the county as well as in the township or parish, functions grown feeble or dormant in the mother country, were called into vigorous life, sometimes being developed under the influence of more favorable conditions beyond the point ever before attained. This is precisely what happened in the case of the quarter sessions. The process of encroachment upon the functions of the county court—or rather of attraction or inheritance, since the latter as such did not here exist—was continued, and powers never possessed by either in the old world were here developed. Thus only through the absorption or transference of functions, by indirect filiation, can the American county courts, during or since the provincial era, be regarded as a continuation of the ancient folkmoot of the shire.

But the continuity of the latter, in essence if not in name, was not absolutely interrupted in this country. It was maintained in the electoral assemblies. The meetings of the voters before the sheriff at the court-house in Virginia for choice of deputies; or those more remarkable gatherings in Pennsylvania before the same magistrate for choice of county officers and assemblymen: these, beyond question, were the representatives of the English county court in the American colonies.[2]

[1] Chap. VI, v.

[2] But see Chap. X, vi, on the relation of the modern county board to the shiremoot and quarter sessions.

CHAPTER X.

RISE OF THE COUNTY IN THE WESTERN STATES.

I.—Genesis of the Commissioner System in the Northwest Territory.

(*a*).—*The First Territorial Constitution.*

The planting of social institutions in the Northwest Territory, under the Ordinance of 1787, is scarcely second in significance to any event in American annals. Whether regarded as the starting point, directly or indirectly, of numerous populous commonwealths, or simply as marking an epoch in the development of constitutional forms and principles, the foundation of Marietta in 1788 deserves a page in history honorable as that which commemorates the settlement of Jamestown or Plymouth.

By the Ordinance the general government of the territory, during the first stage, is vested in a governor, secretary, and judges, all elected by the Congress of the United States.[1] The governor is commander-in-chief of the militia and may appoint and commission all officers, except general officers, who are to be nominated and commissioned by Congress. The governor

[1] But by an act of 1789, the right to appoint these officers is vested in the president by and with the advice and consent of the Senate; and it is further provided, that, in case of death, absence, resignation, or removal of the governor, the duties of that office shall devolve upon the secretary: *U. S. Statutes at Large*, I, 50–53.

is also authorized to create proper divisions for the execution of process, civil and criminal; and, as fast as circumstances may require, to lay off districts, in which the Indian title shall become extinct, into counties and townships, subject, however, to such alterations as may subsequently be made by the legislature.[1] Moreover, he is empowered to "appoint such magistrates and other civil officers, in each county and township, as he shall find necessary for the preservation of the peace and good order in the same."

The supreme court is composed of the three judges, any two being competent to act; and it is invested with common law jurisdiction.

In place of a legislature, the governor and judges, or a majority of them, are required to adopt and publish such laws of the original States, criminal and civil, as may be necessary and most suitable to the existing circumstances; which laws shall be valid throughout the territory unless disapproved by Congress.[2]

[1] Governor St. Clair claimed the right, not only of making the first division of the territory into counties, but also of creating new counties by subdivision. This led to a controversy between him and the assembly, the latter maintaining that the governor's power ceased with the creation of the original counties. The question was finally settled by Congress unfavorably to the governor. See Smith, *St. Clair Papers*, I, 214; II, 515 ff.; Graham, *Legislation in N. W. Territory*, in *Ohio Arch. and Hist. Quart.*, I, 313, 314–15; Hinsdale, *The Old Northwest*, 300.

[2] The Ordinance gave the governor and judges power only to adopt and publish laws of the original states. They proceeded, nevertheless, to enact new ones; and since these measures were not formally disallowed by Congress, they were enforced as if valid: Chase, *Hist. Sketch*, in *Statutes*, I, 19; Graham, *Legislation in N. W. Territory: Ohio Arch. and Hist. Quart.*, I, 305–6; Hinsdale, *The Old Northwest*, 298; Burnet, *Notes*, 63–4. But on May 24, 1794, the House of Representatives adopted a resolution disapproving the laws of the territory enacted in 1792: *Annals 3d Congress*, 1214; *American State Papers, Miscellaneous*, I, 82. Later, "a joint resolution declaring them void was read twice and committed, but no further action was taken. Governor St. Clair stated that it passed the House, but was rejected by the Senate, because, 'as they considered them all *ipso facto* void, they thought it improper to declare any of them so by an act of the legislature.'" Dunn,

A second constitutional stage is reached as soon as the territory contains five thousand free male inhabitants of full age. The power of legislation is then transferred to a general assembly composed of the governor, legislative council, and house of representatives. The representatives are chosen by the people for a term of two years,[1] on the basis of one for every five hundred free male inhabitants; but only residents of the district possessed therein of two hundred acres of land in fee simple are eligible. The council is composed of five members appointed by Congress from ten nominees chosen by the representatives, and holding office for five years. The qualifications of a councilman are residence and a freehold of five hundred acres. The general assembly may make laws, not repugnant to the Ordinance, and prescribe the duties of all magistrates and other civil officers; but no legislative act shall be valid without the governor's assent, and the appointment of magistrates and civil officers is still vested in him.

Such are the principal provisions of the great charter, so far as they relate to the political organization: let us now see how the local machinery was developed in accordance therewith.[2]

Indiana, 273; *Annals 3d Congress*, 1223; and Smith, *St. Clair Papers*, II, 356. See also Howe, *Laws and Courts of Northwest and Indiana Territories*, 9. The laws of 1795 are professedly a literal transcript of the statutes adopted: *Ib.*, 9. In 1792 the governor and judges were authorized to repeal the laws adopted by them whenever they should "be found to be improper": *U. S. Statutes at Large*, I, 286. "The laws enacted by them were originally printed in four volumes, volume 1, containing the laws of 1788, 1790, and 1791; volume 2, containing the laws of 1792; volume 3, the first book printed in the territory, containing the laws of 1795, commonly known as the Maxwell Code, from the name of the printer; volume 4, containing the laws of 1798": Howe, *Laws and Courts*, 6. These volumes are now very scarce; but in 1833, the laws of the governor and judges were reprinted in the collection which I have cited as Chase's *Statutes of Ohio and the Northwest Territory.*

[1] But each elector is required to have a freehold in fifty acres.

[2] For the text of the Ordinance, see Poore, *Charters*, I, 429 ff.; Chase, *Statutes of Ohio and the N. W. Territory*, I, 66–69; *United States Statutes at Large*, I, 51–53; Porter, *Outlines of U. S. Constitution*, 63 ff.; *Journals of Congress*, IV,

(*b*).—*The Inauguration of Civil Institutions.*

On October 5, 1787, General Arthur St. Clair was chosen governor, and Winthrop Sargent, secretary, of the territory; and soon after the judges were appointed.[1] The governor arrived in the new colony on July 9, 1788, and immediately assumed control. But it was not until July 15 that the formal inauguration of civil authority in the Northwest occurred. On that day the commissions of the governor, secretary, and judges, as also the fundamental Ordinance, were read before the assembled people by Secretary Sargent; and Governor St. Clair in an address expounded the principles of the constitution and compact.[2]

But already, three months before the formal reign of law began, local self-government had been established on the Muskingum. April 7, 1788, a band of pioneers, veteran officers and soldiers of the Revolution, had arrived in the Mayflower of the West at the site of Adelphia, the town which they immediately founded. But this village was presently rechristened Marietta[3] in honor of the unfortunate princess who had shown constant friendship for the American cause in the

752; *St. Clair Papers*, II, 612–18; *Life and Journals of Manasseh Cutler*, II, 419–27; *Mag. of West. Hist.*, I, 56–9; Albach, *Western Annals*, 466–72; Cooper, *American Politics*, Book IV, 10–13; Curtis, *Hist. of the Constitution*, I, 302 ff. (a summary); Williams, *Revised Statutes of Ohio*, II, 1686–90; Starr and Curtis, *Annotated Statutes of Illinois*, 1885, I, 42–6; Donaldson, *The Public Domain*, 153–6; Dillon, *Hist. of Indiana*, 597–601.

On the history of the Ordinance, in addition to references elsewhere given (Chap. IV, I, (*a*)), see Dunn, *Indiana*, 177–218; and particularly the chapter on the "Slavery Proviso": *Ib.*, 219–60. Cf. Winsor, *Nar. and Crit. Hist.*, VII, 538.

[1] St. Clair's commission dated from Feb. 1, 1788: Walker, *Athens County*, 88. The judges were appointed Oct. 16, 1787: Burnet, *Notes*, 38.

[2] The inaugural address of Gov. St. Clair is printed by Mr. Smucker in *Mag. of West. Hist.*, Sept., 1888, pp. 488–9.

[3] On July 2: Cox, *Ohio Arch. and Hist. Quart.*, II, 159; Walker, *Athens County*, 87; Albach, *Western Annals*, 476.

struggle for independence, but who, at the moment, strangely enough, was doing what she might to stifle the voice of civil liberty in France. As no public authority had yet been proclaimed in the territory, the settlers, in the spirit of true Englishmen, proceeded to enact laws for their own security and governance. These ordinances—genuine folk laws of a genuine folkmoot—were then nailed to an oak by way of promulgation; and Return Jonathan Meigs—practically the first scirgerefa in the West—was appointed to administer them.[1] And precisely similar measures for self-help were resorted to at Losantiville, the future Cincinnati, founded at the close of the same year. Here also, until the organization of Hamilton county in 1790, the people were governed by laws, which were created by themselves and executed by a sheriff of their own choice.[2]

(*c*).—*The First County Organization.*

The new colonies were established under the very eyes of hostile savages. They were surrounded by a fringe of Indian tribes which, though generally quiet, were restive and threatening; and life and property were frequently destroyed by petty incursions.[3] Provision for military defence, therefore, became the primary duty of the newly established government. Accordingly, on July 25, appeared an ordinance—the very first enactment of the governor and judges—authorizing a militia organization. And here, on the recurrence of similar circumstances, the history of primitive New England is repeated. Both the frequency of trainings and the requirement as to arms remind us of the first orders of the general court

[1] Colonel Ebenezer Sproat, of Washington county, was the first sheriff appointed after the arrival of Gov. St. Clair.

[2] Burnet, *Notes*, 57.

[3] Cox, *Arch. and Hist. Quart.*, II, 157; Albach, *Western Annals*, 475 ff.; Atwater, *History of Ohio*, 132 ff.; Burnet, *Notes*, 58, etc.

of Massachusetts.[1] It was enacted that "all male inhabitants of the age of sixteen and upwards, shall be armed, equipped, and accoutred in the following manner; with a musket and bayonet, or rifle, cartridge box and pouch, or powder horn and bullet pouch, with forty rounds of cartridges, or one pound of powder and four pounds of lead, priming wire and brush and six flints. . . And whereas the assembling of the members of community at fixed periods, conduces to health, civilization, and morality; and such assembling without arms in a newly settled country may be attended with danger; therefore the corps shall be paraded at ten o'clock in the morning of each first day of the week, armed, equipped, and accoutred as aforesaid, in convenient places next adjacent to the place or places . . . assigned for public worship," and at other times and places, "as the commander-in-chief may direct."[2]

In 1791 Saturday instead of Sunday was made the regular training day; but every militiaman attending public worship on the Sabbath was required to go armed and equipped according to law "as if he were marching to engage the enemy."[3]

On the day following the publication of the militia act—the twenty-sixth of July—Washington county was created by proclamation of the governor.[4] This is the oldest county west

[1] See above Chap. VII, IV.

[2] Chase, *Statutes*, I, 92.

[3] Chase, *Statutes*, I, 114. In 1799 the first territorial assembly required trainings to be held every two months, except from January to March inclusive: *Ib.*, 249.

[4] Hamilton, Knox, and St. Clair counties were organized in 1790; Wayne, in 1796; Adams and Jefferson, in 1797; Ross, in 1798. Of these, Knox corresponded roughly to Indiana; St. Clair to Illinois and Wisconsin; while Wayne comprised northern Ohio and Indiana, the northeast corner of Illinois, the eastern edge of Wisconsin, and all of Michigan: See the map of Wayne county in Farmer, *Hist. of Detroit and Mich.*, 119. Cf. Graham, in *Ohio Arch. and Hist. Quart.*, I, 309–10; Smucker, in *Mag. of West. Hist.*, I, 207–8. Howe's *Historical Coll. of Ohio* contains an account of the organization and history of each of the Ohio counties.

However none of the counties created by Gov. St. Clair possessed such generous dimensions as the county of Illinois, established by Virginia in

of Pennsylvania, and, like other counties subsequently formed, it was originally of vast extent, comprising all the region ceded by the Indians east of the Scioto, or about one half of the present state of Ohio.[1] A few days later, on August 23, an act appeared providing for county courts of quarter sessions and common pleas; and soon after a clerk, sheriff, and judges of probate and common pleas were appointed.

The mechanism of the first county was now ready for operation. Accordingly on the second of September, amidst solemn pageantry and ceremony, the court of common pleas began its first session. Dr. Manasseh Cutler, author of the Ordinance, invoked a divine blessing; the commissions of the judges, clerk, and sheriff were read; and then the sheriff, Colonel Ebenezer Sproat, proclaimed: "O, yes! a court is opened for the administration of even-handed justice, to the poor and the rich, to the guilty and the innocent, without respect of persons; none to be punished without trial by their peers, and then in pursuance of the laws and evidence in the case."[2]

Thus it is seen that the builders of 1788 were conscious that they were laying the foundations of a noble edifice; but it may be doubted whether, in their wildest dreams, they were able to conceive either the magnitude or the splendor which the structure would attain in a century to come.[3]

1778, to assert her chartered rights to the western domain. This county, though its boundaries are not defined, would really comprise, not only nearly the whole Northwest Territory, but also undefined regions beyond. See Hening, *Statutes*, IX, 552–5.

[1] This proclamation—which determined the general form of many hundreds of future proclamations for the formation of counties in the West—is printed in Albach's *Western Annals*, 476–7; also in Walker's *Athens County*, 93–4.

[2] See the description of the ceremony in Smith, *St. Clair Papers*, I, 148–9; Cox, *Ohio Arch. and Hist. Quart.*, II, 159 f.; Albach, *Western Annals*, 477–8. On Sept. 9, the first court of quarter sessions was opened: Hildreth, *Pioneer History*, 233; Smith, *St. Clair Papers*, I, 149, note 2.

[3] On the planting and development of civil institutions in the Northwest Territory, see Smith, *St. Clair Papers*, I, 137 ff.; Farmer, *Hist. of Detroit and*

(*d*).—*Judicial Administration.*

The county organization as gradually established in the Northwest Territory was modelled on the type which had generally prevailed during the colonial era. But there was a decided retrogression as compared with the contemporary institution in New York and Pennsylvania. For, in accordance with the provisions of the Ordinance, it was wholly centralized, the right of appointment to all positions being vested in the governor. With the exception of the elective principle, however, the legal system of Pennsylvania, in this as in other respects, was usually imitated by the territorial legislation, though the traces of southern and New England influences are not wanting.

Besides the high sheriff already mentioned, the officers of the county were a coroner,[1] a treasurer,[2] a recorder of deeds,[3] a judge of probate, and the justices of the county courts.

The judicial system of the county consisted of five classes of tribunals: a court of common pleas, a court of general quarter sessions, a court of probate, a court of orphans, and the courts of the single justices of the peace.

Mich., 95 ff., 179 ff., 189 ff.; Dunn, *Indiana*, 261 ff.; Hinsdale, *The Old Northwest*, 286 ff.; Judge Joseph Cox's Marietta Centennial Address: *Ohio Arch. and Hist. Quart.*, II, 150–73: Graham, *The Legislation in the Northwest Territory*, *Ib.*, I, 303–18; Chase, *Preliminary Sketch of the History of Ohio*, in *Statutes*, I, 5–48; Howe, *Laws and Courts of Northwest and Indiana Territories*; Smucker, *Our Territorial Statesmen*, in *Mag. of West. Hist.*, I, 207 ff.; *Our First Court*, *Ib.*, IX, Nov. 1888; *Centennial Anniversary*, *Ib.*, VII, April, 1888; and VIII, Sept., 1888; Albach, *Western Annals*, 473–9; McMasters, *History of the People of U. S.*, I, 513 ff.; Perkins, *Fifty Years of Ohio: N. A. Review*, XLVII, 15, 22, 29, 41; Walker, *Athens County*, 83 ff.; Atwater, *Hist. of Ohio*, 128 ff.; Burnet, *Notes*, 38–65; Blanchard, *Discovery and Conquests*, 187; Monette, *Hist. of the Discovery and Settlement*, II, 236–54.

[1] The act of Dec. 21, 1788, provides for the appointment of one coroner in each county: Chase, *Statutes*, I, 102. Cf. the act of 1795: *Ib.*, 198.

[2] Act of 1792: Chase, *Statutes*, I, 118.

[3] The recorder's office was created in 1795: Chase, *Statutes*, I, 167–8.

The courts of orphans[1] and probate[2] were invested with the usual powers. Out of sessions the single justice of the peace could take recognizances and perform the ordinary duties of a peace magistrate; and he was also authorized to determine petty offences punishable by fine.[3]

The court of common pleas was composed of not less than three nor more than five judges, appointed and commissioned by the governor. It was held twice a year at the same place as the quarter sessions; and exercised jurisdiction in all civil suits, with appeal to the court of the territory. But one or more of the judges could try actions for debt to the amount of five dollars.[4]

The court of quarter sessions possessed substantially the same character as the English sessions of the seventeenth century. It was composed of justices of the peace commissioned for the county at large, of whom not less than three nor more than five were specially designated to hold the court. Any three, one being of the quorum, were competent to act.[5] Four regular sessions and as many special sessions as the justices saw fit were held each year. The court exercised criminal jurisdiction in all cases not involving life or limb, imprisonment for more than one year, or the forfeiture of chattels, goods, or tenements.[6]

(*e*).—*A Barbarous Criminal Code.*

Few communities have been founded under more favorable conditions than those of the Northwest Territory.[7] Civil

[1] Established by the act of 1795: Chase, *Statutes*, I, 159.

[2] Established Aug. 30, 1788: Chase, *Statutes*, I, 96.

[3] Chase, *Statutes*, I, 94.

[4] Chase, *Historical Sketch*, 26–7; *Statutes*, I, 95. In 1790 the maximum number of judges of common pleas was fixed at seven and the number of terms increased to four: *Ib.*, 107.

[5] The justices of the quorum in each county were increased to nine in 1790: Chase, *Statutes*, 1, 107.

[6] Chase, *Statutes*, I, 94–6. Cf. the act of 1795: *Ib.*, 147–8.

[7] "No colony in America was ever settled under such favorable auspices as that which has just commenced at the Muskingum. Information, prop-

liberty was secured and popular education was encouraged by the incomparable provisions of the compact. The settlers, both magistrates and people, were conspicuous for intelligence and morality. Nevertheless, how little real progress had yet been made in social science, is strikingly revealed by the character of the penal legislation. Many years after the colonization began, the local tribunals were required to administer the same barbarous punishments as had characterized the quarter sessions of both Old and New England in the seventeenth century. Every county had its stocks, pillory, whipping post, and sometimes more cruel instruments of torture.[1]

By the act of September 6, 1788—the first criminal code established in the Northwest[2]—flogging and the pillory are lavishly prescribed for many offences. Thus, for obstructing the authority of a magistrate, the offender shall be fined not more than three hundred dollars and receive not to exceed thirty-nine lashes. For larceny, the convicted party, besides restoring double[3] the value of the thing stolen, is required to pay a fine of the same amount, or be whipped not exceeding thirty-nine stripes, according as the court shall determine. And the legislator's conception of the pecuniary equivalence of physical suffering may perhaps be inferred from the provision that a person guilty of perjury or subornation of perjury "shall be fined in a sum not exceeding sixty dollars, or be whipped not exceeding thirty-nine stripes, and shall moreover be set in the pillory for a space of time not exceeding two hours," and be forever incapable of holding office, giving testimony, or serving as a juror.[4]

erty, and strength will be its characteristics. I know many of the settlers personally, and there never were men better calculated to promote the welfare of such a community": Washington's letter to Henderson: Sparks, IX, 385.

[1] Chase, *Statutes*, I, 122–3 (1792).

[2] Chase, *Statutes*, I, 97–101.

[3] Or the thing stolen, in addition to its value.

[4] The disparity between the amount of the fine and the severity of the corporal punishment is, however, not so strikingly absurd in this instance

The same number of stripes is prescribed for the burglar whose attempt at theft has not succeeded; and he is also required to find sureties for good behavior or go to jail for a period not exceeding three years. If successful, in addition to the foregoing penalties, he shall be fined in treble the value of the property stolen, one-third to the territory and two-thirds to the injured party. And if he commit or attempt to commit violence, or if he be caught with arms in his hands, with the plain intent to do injury, he may be imprisoned in any jail in the county for a term of forty years. But even this is not sufficient. His family must be reduced to beggary and a bribe offered for conviction; since all his property, real and personal, is forfeited to the territory, the injured party to be recompensed therefrom. Moreover this last penalty is prescribed in the case of arson; and the offender, in addition, shall be whipped, put in the pillory, and confined in jail for a period of not more than three years.

The governor and judges were not quite so thoroughly imbued with the spirit of the Levitical law, as were the framers of the first codes of New Haven and Connecticut.[1] Disobedi-

as in the law of 1795 for the punishment of larceny under a dollar and a half. It is provided that any person found guilty of such an offence before any two justices of the county, shall "be immediately and publicly whipped, upon his or her bare back, not exceeding fifteen lashes; or be fined in any sum, at the discretion of the said justices, not exceeding three dollars; and, if able, to make restitution, besides, to the party wronged: paying also the charges of the prosecution and whipping: or, otherwise, shall be sent to the work-house, to be kept at hard labor: and for want of such work-house, to be committed to prison, for such charges, for a term not exceeding twelve days." Chase, *Statutes*, I, 147. See also Dillon, *Hist. of Indiana*, 375.

[1] "If any child, or children, above sixteen years old, and of competent understanding, shall curse, or smite, his, her, or their naturall father, or mother, each such child shall be put to death, Exod. 21. 17. Levit. 20. 9. Exod. 21. 15, unlesse it be proved, that the parents have been very unchristainly negligent in the education of such child, or children, or so provoked them by extream and cruell correction, or usage, that they have been urged or forced thereunto, to preserve themselves from death or maiming": New Haven Code, 1655: Trumbull, *Blue Laws*, 201. A like provision in

ence to parents was not made a capital crime. But the following provision is certainly remarkable, not to say patriarchal, in character. It was enacted that, "if any children or servants shall contrary to the obedience due to their parents or masters, resist or refuse to obey their lawful commands, upon complaint thereof to a justice of the peace, it shall be lawful for such justice to send him or them so offending, to the gaol or house of correction, there to remain until he or they shall humble themselves to the said parents, or masters satisfaction. And if any child or servant shall contrary to his bounden duty presume to assault or strike his parent or master, upon complaint and conviction thereof, before two or more justices of the peace, the offender shall be whipped not exceeding ten stripes."[1]

The penal laws of the Northwest Territory remained in force in Indiana after the erection of that territory in 1800; and new measures were enacted in the same spirit.[2]

By the early legislation of Illinois, likewise, branding with a hot iron was authorized; and stripes upon the naked body, varying in number from ten to five hundred, according to the nature of the offence, were prescribed.[3]

Similar laws existed in the territory of Michigan. Persons

almost exactly the same words is contained in the "Capital Laws" of Connecticut, 1642: Trumbull, *Blue Laws*, 69. And it was incorporated in the Duke of York's *Laws*, 15.

[1] The harsh criminal code put in force by the governor and judges in 1788, was re-enacted by the assembly of 1799: Chase, *Statutes*, I, 212; and whipping, the pillory, and ear-cropping were retained in the laws of Ohio until 1815: Chase, *Statutes*, I, 614 ff. (1809), 856 ff. (1815). See an interesting account of the early penal legislation, by Harley Barnes, *The Whipping Post in Ohio: Mag. of West. Hist.*, II, 192–6; and H. B. Curtis' description of the flogging of John Courson for stealing flour, at Newark, Licking County, 1812: *Pioneer Days in Central Ohio*, in *Arch. and Hist. Quart.*, I, 250–1. Cf. Howe, *The Laws and Courts of Northwest and Indiana Territories*, 7.

[2] Thus bigamy was made a capital crime: Howe, *The Laws and Courts*, 15. Cf. Dillon, *Hist. of Indiana*, 421.

[3] Davidson and Stuvé, *Hist. of Ill.*, 286. Arson and horse-stealing, on second conviction, were punished with death: *Ib.*, 287.

practising witchcraft were punished by fine not exceeding fifty dollars, or by imprisonment for not more than three months.[1] On the order of a single justice of the peace, petty offenders were publicly whipped, and their services might be sold at auction to the highest bidder for a period of three months or less.[2] "The whipping post disgraced the Detroit market house until 1831, when this relic of barbarism was forever removed."[3]

(*f*).—*Sabbath Laws and the Debtor's Prison.*

The practice of imprisonment for debt was perpetuated in all its harshness and the revolting scenes of the Marshalsea or the Fleet were re-enacted on western soil. By an act of the governor and judges of the Northwest Territory in 1795, the unfortunate debtor, for any sum *less* than five dollars, is made liable to indefinite imprisonment. On complaint before any justice of the common pleas or quarter sessions, if the defendant do not produce effects sufficient to satisfy the sum in execution, the constable is "required to take such defendant into the jail of the proper county; and the sheriff or keeper of such jail . . . is required to receive the person so taken in execution, and him safely keep, till the sum recovered, with costs, be paid, or satisfaction made by goods or otherwise."[4] Subsequently the impecunious debtor was graciously allowed to substitute servitude for imprisonment. It was provided that no person shall be kept in jail after the second day of the session next following the day of commitment, unless the plaintiff make it appear that the debtor has undisclosed estate.

[1] *Territorial Laws*, I, 113 (1816).

[2] Farmer, *Hist. of Detroit and Mich.*, 190. See the act of the governor and judges of Michigan, July 27, 1818: *Territorial Laws*, II, 138–9.

[3] Campbell, *Pol. Hist. of Mich.*, 405.

[4] Chase, *Statutes*, I, 143. For the procedure in case of greater debts, see *Ib.*, 144 f.

If no such estate be found, then, if the plaintiff require it, the debtor shall "make satisfaction by personal and reasonable servitude" for a period not exceeding *seven years*, according to the discretion of the court. This penalty, however, is restricted to unmarried debtors[1] under forty years of age, "unless it may be the request" of persons above that age; but "if the debtor be married, and under the age of thirty-six, the servitude shall be for five years only." In either case if the creditor do not accept the "satisfaction" the debtor shall be discharged.[2]

An act of 1799 for the relief of prisoners for debt provides that, where any such person establishes the fact that he has not sufficient estate to support himself while in jail,[3] he may be set free; but in that event, the execution creditor is liable for the jail fees and cost of diet, and these are constituted a

[1] Bachelors fared ill under the early laws. The measure just cited is not the only one which reminds us of the Roman legislation of the early Empire. Thus by an act for regulating county levies, passed by the governor and judges of Indiana Territory, 1803, it was provided that, "a *single man* above the age of twenty-one years, not having property to the amount of four hundred dollars and neglecting to pay the tax assessed against him, should be committed to the county jail 'where he shall remain until the said tax shall be paid, unless some reputable person, in the opinion of the sheriff, shall be forth-coming therefor.' Perhaps this law was not enacted for revenue only, but also to encourage marrying. At any rate to pay, marry, or run away, were the only alternatives presented to the young man of that day": Howe, *Laws and Courts*, 13–14. See also Davidson and Stuvé, *History of Ill.*, 287.

[2] Chase, *Statutes*, I, 203–4.

[3] He was required to subscribe the following "iron-clad" oath: "I . . do in the presence of Almighty God, solemnly swear (or affirm as the case may be) that I have not any estate, real or personal, in possession, reversion, or remainder, sufficient to support myself in prison, or to pay prison charges, and that I have not, since the commencement of this suit against me, or at any other time, directly or indirectly sold, leased, or otherwise conveyed or disposed of to, or entrusted any person or persons whatsoever, with all or any part of the estate, real or personal, whereof I have been the lawful possessor," with intent to keep it from the creditor: Chase, *Statutes*, I, 259.

debt for which the person discharged is responsible just as for other obligations.[1]

Finally it may be noted that the legislators of the Northwest Territory did not neglect the enactment of laws for the punishment of profanity and sabbath-breaking. Their first measure on these subjects is unique, and will recall the moral admonitions incorporated in the capitularies of Charles the Great:

"Whereas idle, vain and obscene conversation, profane cursing and swearing, and more especially the irreverently mentioning, calling upon, or invoking the sacred and supreme Being, by any of the divine characters in which he hath graciously condescended to reveal his infinitely beneficent purposes to mankind, are repugnant to every moral sentiment, subversive of every obligation, inconsistent with the ornaments of polished life, and abhorrent to the principles of the most benevolent religion. It is expected therefore, if crimes of this kind should exist, they will not find encouragement, countenance, or approbation in the territory. It is strictly enjoined upon all officers and ministers of justice, upon parents, and

[1] Chase, *Statutes*, I, 259. Similar laws were enacted in Illinois Territory: Davidson and Stuvé, *Hist. of Ill.*, 287. Imprisonment for debt prevailed in Michigan until 1822, when it was conditionally abolished whenever estates were assigned for the benefit of creditors: *Territorial Laws*, I, 83 ff., 206 ff., 255 ff.; Farmer, *Hist. of Detroit and Mich.*, 177.

By an act of 1819, the English institution of prison "bounds" was there introduced. It is provided, "That every person imprisoned for debt, either on mesne process or execution, shall be permitted and allowed the privilege of bounds, which are or may be laid off and assigned by metes and bounds around or adjoining each county jail, by the judges of the county courts in each of their respective counties: Provided, The same do not extend in any direction from the said jail more than seventeen hundred and sixty yards; but such prisoner shall in no instance, pass over or without such limits." But this indulgence is granted only to a debtor who can give a bond, with two approved sureties, in double the sum for which he stands committed: *Mich. Territorial Laws*, II, 155.

In Michigan the poor were sold by the sheriff to the lowest bidder: *Territorial Laws*, II, 115 (1817). Cf. *Wis. Hist. Coll.*, II, 95.

others, heads of families, and upon others of every description, that they abstain from practices so vile and irrational; and that by example and precept, to the utmost of their power, they prevent the necessity of adopting and publishing laws, with penalties upon this head. And it is hereby declared that government will consider as unworthy its confidence all those who may obstinately violate these injunctions." A similar "injunction" is likewise laid down for the proper observance of the "first day."[1]

The foregoing measure can scarcely be styled a "law without a sanction," for the rather broad hint that government patronage may be withheld, though a novel, is perhaps not an entirely ineffective penalty for the moral delinquencies of American citizens. However, in 1799, the assembly found it expedient to resort to more commonplace methods. Every "profane curse, damn, or oath" was then made punishable by fine, or in default of payment, by labor upon the highway under direction of the road overseer; and sabbath-breaking was forbidden under similar penalties.[2]

(*g*).—*Civil Administration of the Quarter Sessions and Tax Commissioners.*

As usual the justices in quarter sessions were constituted the general administrative authority of the county. The care of highways devolved upon them;[3] they were entrusted with the licensing of taverns[4] and the fixing of rates for ferries;[5] and they had charge of the poor.[6] They could also divide the

[1] Law respecting crimes, Sept. 6, 1788: Chase, *Statutes*, I, 101. Mr. Howe, *Laws and Courts*, 8, thinks this the only known instance of a "threat to legislate by a legislative body."

[2] Chase, *Statutes*, I, 228.

[3] Chase, *Statutes*, I, 120–1, 260 ff.

[4] Chase, *Statutes*, I, 294.

[5] Chase, *Statutes*, I, 219–20.

[6] Chase, *Statutes*, I, 175–8. The Pennsylvania statute was adopted.

county into election districts,[1] lay out townships, and appoint clerks, constables,[2] overseers of the poor,[3] fence viewers,[4] and other township officers.

To the justices also belonged the supervision of taxation and finance; but this function was ultimately entrusted to a board of commissioners—a body which was gradually differentiated. Thus, in 1792, it was made the duty of the quarter sessions to calculate the levy required for each year subject to the approval of the territorial judges. One or more commissioners for each township were to be appointed by the judges of common pleas; and these commissioners were required to assemble annually and apportion the tax upon the respective towns according to "wealth and numbers." The quotas were then assessed in each town by three assessors likewise appointed by the common pleas.[5] This is the germ of the county commissioner system in the West. But in 1795 the Pennsylvania plan was introduced. An assessor was to be elected in each town, for which also three commissioners, one retiring annually, were to be appointed by the quarter sessions. The assessors and commissioners, in joint assembly, were constituted a county board of audit; and they were authorized to appoint the tax collectors.[6] This is the second stage in the differentiation of the board of commissioners in the West.

A third step was taken by the first general assembly of the territory, 1799, when a county board of three commissioners was created and entrusted with the levy and assessment of taxes and the auditing of claims. But the quarter sessions were still the higher fiscal authority. They could appoint the

[1] Chase, *Statutes*, I, 304.

[2] See the act of the first assembly, 1799: Chase, *Statutes*, I, 240, where the sessions are authorized to appoint constables as census takers.

[3] Chase, *Statutes*, I, 107–9, 175–82.

[4] Chase, *Statutes*, I, 112. Here the fence viewer is styled "appraiser of damages and viewers of inclosures." Cf. *Ib.*, 184, 216.

[5] Chase, *Statutes*, I, 118–19.

[6] Chase, *Statutes*, I, 168–71.

commissioners, hear appeals from them, and let contracts for county buildings; but the commissioners might appoint their own secretary or clerk, audit accounts under contracts, and take final appeal from the decisions of the sessions to the supreme court of the territory.[1]

(*h*).—*Emancipation of the County.*

Such was the character of county administration in the Northwest Territory; and it is plain that the people were allowed very little direct voice in the matter; though, on the advent of the town-meeting, with authority to choose local officers, the means of local self-government was in part supplied.[2] But under the first legislation of Ohio, after that portion of the territory was erected into a state, a much more popular system was introduced. The old courts of probate, orphans, common pleas, and quarter sessions were at once abolished, and their jurisdiction and powers vested in new courts of common pleas consisting of three associate justices in each county, presided over by a circuit judge.[3] All county officers were soon made elective;[4] and, in 1804, a board of three elective county commissioners was instituted. In this body was vested the fiscal and general administrative authority of the old quarter sessions, which had been temporarily lodged in the courts of common pleas.[5] With this event that centralized type of free county government, which has since found its way into many western states and territories, was organically complete. Furthermore the early institutional history of Indiana and Illinois, with respect to the subject under consideration, is merely a continuation of that of the Northwest

[1] Chase, *Statutes*, I, 274–77.
[2] See above Chap. IV, 1, (*b*).
[3] Chase, *Statutes*, I, 356–60.
[4] Chase, *Statutes*, I, 362, 364.
[5] Chase, *Statutes*, I, 410–12, 369.

Territory; and in each instance, as in Ohio, the free county, with elective officers and a board of commissioners, was introduced after the attainment of statehood.[1]

Let us now trace the evolution of county organization in Michigan Territory, where a different result will be reached.

II.—Genesis of the Supervisor System in Michigan Territory.

(*a*).—*French Manors and Common Fields.*

The history of Michigan, as her latest historian has so thoroughly demonstrated, is "a history of governments." And, indeed, the vicissitudes of the local constitution have been scarcely less remarkable than those of the higher authority. Her institutional history fairly begins with the arrival of La Mothe Cadillac on the site of Detroit, in 1701.[2]

[1] The laws of the Northwest Territory remained valid in Indiana after the formation of that territory in 1800; and the first act of the governor and judges of Illinois Territory was to declare all laws of Indiana, not of a special nature, in force prior to March 1, 1809, valid in the territory of Illinois: Howe, *Laws and Courts*, 11. Cf. Dunn, *Indiana*, 294–5. See also Davidson and Stuvé, *Hist of Ill.*, 285. Mr. Howe gives the following interesting comparison:

"There is this marked distinction between the laws of the governor and judges of the Indiana territory and those adopted by the governor and judges of the Northwest territory: of the former, where the source from which the law was taken is stated in the titles of them, seven were taken from Virginia, three from Kentucky, two from Virginia and Kentucky, one from New York, Pennsylvania, and Virginia, and two from Pennsylvania; whereas of the thirty-eight laws in the Maxwell code, where the titles express the source, twenty-six were taken from Pennsylvania, six from Massachusetts, one from New York, one from New Jersey, and three from Virginia. In other words the governor and judges of the Indiana territory, took only two laws from a free state, while the governor and judges of the Northwest territory took only three laws from a slave state." *Laws and Courts*, 16.

[2] There were, of course, earlier posts established in Michigan—at Ste. Marie and Michilimackinac; but Detroit was the only settlement which

Fort Pontchartrain was immediately built; and Cadillac remained commandant of the post until 1710, when he departed to assume the duties of intendant of Louisiana. Throughout the entire period of French supremacy the inhabitants of Michigan were ruled chiefly by martial law, administered by the commandant under the superior jurisdiction of the governor and intendant of Canada.[1] But the civil authority of Cadillac obtained indirectly a higher sanction. In accordance with the usual practice of the French, the fort, with a certain tract of land, was granted to him as a seigneurie, or manor; and doubtless the grant carried with it powers "not less than those belonging to the highest feudal lordship of France."[2] Moreover he was authorized to alienate portions of the public land, but on such general conditions as were prescribed by the *Coutume de Paris* or by the decrees of the king.[3]

Accordingly, on March 10, 1707, two manors were erected, one granted to François Fafard de Lorme and the other to Jacques de Marsac.[4] The conditions of the former of these conveyances—so often described by annalists of the West—are precisely similar in character to those of contemporary tenures in France. The grant consists of two arpents[5] in front by twenty in depth "on one side our manor." It is re-

gained any political significance during the eighteenth century. See Cooley, *Michigan*, 38–9.

[1] See Walker, *The Northwest during the Revolution: Mich. Pioneer Coll.*, III, 13; Campbell, *Political History of Mich.*, 65.

[2] Campbell, *Pol. Hist. of Mich.*, 78, 65.

[3] On the grant to Cadillac and his authority to erect manors, see Farmer, *History of Detroit and Mich.*, 17; Campbell, *Pol. Hist. of Mich.*, 70. Mrs. Sheldon's *Early History of Michigan* contains much valuable matter relating to Cadillac, but little of importance connected with law or institutions.

[4] In *American State Papers, Public Lands*, I, 250, the name is written: "Jacob de Marsac, dit Desroches."

[5] "Antoine de la Mothe Cadillac . . . is said to have been granted a domain of fifteen arpents square. The arpent, however, was not a uniform measure. The United States standard fixes it at 192.24 feet. A woodland arpent is a little more than a square acre: but arpents and acres are often used as interchangeable terms:" Farmer, *Hist. of Detroit and Mich.*, 17.

cited that the "said François . . . shall be bound to pay us, our heirs and assigns, in our castle and principal manor, each year, . . . the sum of five livres quit-rent and rent, and over and above for other rights, . . . the sum of ten livres, in peltries, good and merchantable." Later these dues are to be paid in money. The grantee is to enjoy the right of fishing and hunting, except as to hares, rabbits, partridges, and pheasants; likewise of trade, but no agents or clerks, not domiciled at Detroit, may be employed. A characteristic French custom is preserved in the requirement that the grantee shall "come and carry, plant or help to plant, a long May-pole before the door of our principal manor on the first day of May, in every year," under penalty of three livres for neglect. The estate may not be alienated or hypothecated without the grantor's consent; and in case of sale, the latter has the right of pre-emption, that is, of taking the estate at the same price as the other purchaser offers. This corresponds to the *retrait censuel* of the seigneur in France, but it is not authorized by the Coutume de Paris.[1] The estate is also subject to *banalité* of the mill, that is, the proprietor is required to "come and grind his grain" in the mill of the seigneur, and pay a toll of eight pounds for each minot—about three bushels.[2] The grantee is also bound to furnish timber for vessels and fortifications, when desired, and he is prohibited from working at the trade of blacksmith, cutler, armorer, or brewer, without special permission.[3]

[1] Tocqueville, *The Old Régime*, 334. Cf. Campbell, *Pol. Hist. of Mich.*, 73.

[2] For an example of the usual burdens of a French holding, see the enumeration of the revenues of the estate of Brosses, in Taine, *The Ancient Régime*, 405–9. Cf. *Ib.*, 22–6; and Tocqueville, *The Old Régime*, 333 ff.

[3] For a translation of this conveyance, see *American State Papers, Public Lands*, I, 250–1. On the manors and the settlement of Detroit, see Farmer, *Hist. of Detroit and Mich.*, 17 ff.; Campbell, *Pol. Hist. of Mich.*, 70–6; Albach, *Annals*, 84–6; Blanchard, *Discovery and Conquests*, 72; Dillon, *Hist. of Indiana*, 19; *Cass Manuscripts: Wis. Hist. Coll.*, III, 167–8; Hubbard, *Early Colonization of Detroit: Mich. Pioneer Coll.*, I, 347 ff.

Similar grants were subsequently made by Cadillac and others, on much the same conditions.[1]

Not less interesting than these traces of *l'ancien régime*, is the appearance of French communistic institutions in the Northwest. Within the fort at Detroit a village gradually arose. There each householder had his lot and dwelling. Outside the walls was the arable field in which he had a separate share, and which was enclosed and tilled in common. Moreover each villager was entitled to free enjoyment of the pasture land which lay beyond. Thus we behold the elements of the ancient mark society in its manorial stage: the undivided mark or waste; the arable mark, surrounded by its tun or hedge; while the village itself is a veritable *burh* or fortified township.[2] And similar customs prevailed elsewhere in the French dominions, for example, in the settlements of upper Louisiana—notably at Vincennes and at Kaskaskia in the Illinois.[3]

[1] *American State Papers, Public Lands*, I, 251 ff. They are discussed by Farmer, *Hist. of Detroit and Mich.*, 18 ff. Cf. Campbell, *Pol. Hist. of Mich.*, 90–1.

[2] See Farmer, *Hist. of Detroit and Mich.*, 24–5. Cf. Parkman, *The Conspiracy of Pontiac*, I, 213.

[3] For an interesting account of the common fields at Vincennes, see Dunn, *Indiana*, 94–8. Here the "commons" or pastures were enclosed, and the cultivated lands were allowed to lie open. In 1790 the inhabitants of Vincennes, in a petition, claimed a "prescriptive right" to the commons; and Congress allowed the claim. "In 1799 it was provided by law that the owners of any common field might assemble, elect officers, and decide on such regulations as they deem proper for the management of their property, including the right to levy assessments for necessary expenses. All questions were to be decided by the vote of the majority in interest. The immediate supervision of the field was to be by three persons selected as a 'field committee.' Any proprietor who so desired, might fence in his allotment and hold it in severalty, at any time:" Dunn, p. 97; Chase, *Statutes*, I, 280–2. Cf. Law, *Hist. of Vincennes*, 121–3.

On the French customs at Kaskaskia and elsewhere in Louisiana, see Albach, *Annals*, 201–4, 194 ff.; Carr, *Missouri*, 46; Monette, *Hist. of the Discovery*, I, 181 ff.

From an early period there was at Detroit a deputy intendant, who acted as local receiver of the king's revenue. He may also have exercised judicial authority; and he sometimes discharged the duties of royal notary. The notarial office was everywhere characteristic of French administration, and, in this case, it was retained after the English conquest. "It practically combined the duties of court clerk and register of deeds. The notary kept copies of all papers witnessed by or before him, registered marriage contracts, and was connected with every transaction in business and in social life."[1]

Elsewhere in the French settlements minor civil disputes were often settled by the private arbitration of neighbors; while petty misdemeanors were referred to the priest, who might impose spiritual penalties.[2] Similar customs probably prevailed at Detroit;[3] and the practice of arbitration survived in the curious procedure subsequently established under the English rule.

(*b*).—*British Commandants and Courts of Arbitration.*

After the conquest no attempt was made by the English authorities to provide civil government for their western settlements. The commandant was the only representative of the crown at Detroit. He was practically sole judge and leg-

[1] Farmer, *Hist. of Detroit and Mich.*, 172. See Campbell, *Pol. Hist. of Mich.*, 96–7; Breese, *Early Hist. of Ill.*, 221.

[2] "In those little disturbances which would naturally arise from Antoine's saying hard things of his neighbor, Baptiste, who had killed his dog, or whipped his child, the offended party would carry his complaint to the good curè, and in the confessional, or somewhere else, the '*tort-feasor*' would be required to make the proper atonement. It must not be supposed, however, because the priest was a Jesuit, that his punishment partook of the cruelty of the rack and the inquisition—an additional *ave* and *credo* was, in general, sufficient penance:" Breese, *Early Hist. of Ill.*, 222. See his whole chapter XXII: and compare Davidson and Stuvé, *Comp. Hist. of Ill.*, 131; Law, *Hist. of Vincennes*, 16–17.

[3] Cf. Cooley, *Michigan*, 74.

islator, though he might delegate his authority to another.[1] Thus in 1767 was created a court of arbitration of a peculiar description. Philip Dejean, a merchant, whose name appears for some years thereafter in judicial annals, received a commission from the commandant, which runs as follows:

"I do hereby nominate and appoint you Justice of the Peace, to inquire into all complaints that shall come before you, for which purpose you are hereby authorized to examine by oath such evidences as shall be necessary that the truth of the matter may be better known; provided always that you give no judgment or final award but at their joint request, and which by bond they bind themselves to abide by, but settle the determination of the matter by arbitration, which they are likewise to give their bond to abide by, one or two persons to be chosen by each; and if they can not agree and have named two only you name a third, and if four, a fifth, and their determination or award to be approved by me before put in execution. I further authorize and impower you to act as chief and sole notary and tabellion, by drawing all wills, deeds, etc., proper for that department, the same to be done in English only, and I also appoint you sole vendue master."

Three months later Dejean was further empowered as "second judge" to hold a court twice a month for the trial of actions for debt, trespass, or contract, where the amount in controversy should not exceed five pounds, New York currency.[2]

By the celebrated act of 1774,[3] the entire region west of New York and extending from the Ohio and the Mississippi to Hudson's Bay was added to the Province of Quebec. Legislative authority, subject in some cases to the approval of

[1] This was done by Bradstreet, commandant in 1764: Cooley, *Michigan*, 68; Campbell, *Pol. Hist. of Mich.*, 137, 141. And Pierre St. Cosme was acting as justice of the peace in 1762: Farmer, *Hist. of Detroit and Mich.*, 172.

[2] See both commissions in Campbell, *Pol. Hist. of Mich.*, 141–3. Cf. Cooley, *Michigan*, 74.

[3] The text of the Quebec Act is printed in *Wis. Hist. Coll.*, XI, 53–60.

the crown, was vested in a governor general, or in his absence, a lieutenant governor, and a council consisting of from seventeen to twenty-three members—all appointed by the king. But judicial decisions were to conform to the English law in criminal and to the French law in civil actions. In theory, therefore, Detroit and Michigan were at last provided with civil government. But it was in theory only; for to secure the protection of the courts, even in petty actions for debt, it would have been necessary for litigants to traverse the vast distance between the Straits and Montreal.[1] Accordingly no important change was wrought in the government of the Northwest. Martial law still reigned supreme at Detroit. The resident governor was ex officio justice of the peace, and freely exercised both criminal and civil jurisdiction.[2] Similar powers were exercised by the local commandant, who even baptized and joined persons in marriage.[3] In practice, however, disputes were sometimes submitted to arbitration as before;[4] and in 1779 a new system of arbitration was intro-

[1] *Haldimand Papers: Mich. Pioneer Coll.*, XI, 637, 642–3; X, 456, 462.

[2] See the letter of Gov. Carleton to Hamilton in Farmer's *Hist. of Detroit and Mich.*, 172; and in *Haldimand Papers: Mich. Pioneer Coll.*, IX, 345–6.

"All military commandants were civil officers *ex officio*, whether so commissioned or not, and they decided questions of property, and put litigants into the guard-house who disobeyed their decisions," etc. From testimony of Thomas Smith before the Commissioners of Claims, July 14, 1821: Farmer, 172.

[3] In 1793 an act to legalize such marriages was passed: Frazer, Introduction to *Mich. Territorial Laws*, I, p. ix. Cf. Farmer, *Hist. of Detroit and Mich.*, 171.

In 1774 the whole upper region was placed under a "lieutenant governor" who resided as superintendent at Detroit; but there was also a local commandant, who sometimes disputed the jurisdiction of the former: *Ib.*, 172. See the list of commandants in *Ib.*, 226–7.

[4] Dejean still continued to exercise judicial functions, and actually tried capital cases and executed the death penalty, thus earning the title of "Grand Judge of Detroit." See Cooley, *Michigan*, 74–5; Walker, *The Northwest during the Revolution: Mich. Pioneer Coll.*, III, 17; Campbell, *Pol. Hist. of Mich.*, 162 ff.; Farmer, *Hist. of Detroit and Mich.*, 172. The authority of Dejean was not recognized at Montreal; but it appears that as

duced. "The commandant suggested the establishment of a court of trustees, with jurisdiction extending to ten pounds. Eighteen of the merchants then entered into a bond that three of them, in rotation, would hold a weekly court, and that they would defend any appeals which might be taken to the courts at Montreal. This court lasted about eighteen months, and then, as legal objections were made to it, the court was abolished." [1]

But it should be noted that these tribunals existed only by sufferance of the commandant. There was no legal means of enforcing their decrees. "Those who submitted their differences to the arbitrators could not be compelled to abide by their decisions; yet the dread of the consequences of refusing to submit to those determinations gave force to their awards; for those who would not obey could not recover debts, and the commanding officer refused to grant them passes to go for their canoes to the Indian Country. . . . People who lived in Detroit were compelled to submit, or live there as out law'd." [2] Finally, in 1788, the first step was taken toward the establishment of civil government in the western part of the province. What was soon to be styled Upper Canada [3] was then divided into four new districts,

early as 1779 Thomas Williams was commissioned as justice of the peace by Sir Frederick Haldimand, governor general of Canada: Farmer, pp. 172, 174.

[1] Farmer, *Hist. of Detroit and Mich.*, 174. Cf. Strong, *Hist. of Wisconsin Territory*, 165–70.

[2] From the answer of William Robertson, of Detroit, to the Committee of the Council at Montreal, Oct. 24, 1788: *Haldimand Papers*, in *Mich. Pioneer Coll.*, XI, 631–2. Speaking of the court of arbitration, Mr. Robertson adds: "I can only consider it as a laudable but inefficacious establishment devised by urgent necessity for the exigences of the place, but which never was intended to supersede, but supply, the immediate want of a court of law," etc.: *Ib.*, 643, 649.

[3] By an act of Dec. 26, 1791, the province of Quebec was divided into two provinces—Upper and Lower Canada; the Quebec Bill was repealed, so far as Upper Canada was concerned; and trial by jury was allowed in

Michigan and the whole Northwest being included in that of Hesse.[1] For each district a court of common pleas, with plenary jurisdiction, to be held by three judges nominated by the governor general, was erected; justices of the peace were commissioned, who could hold courts of general sessions; and there were also appointed a clerk, a coroner, and a sheriff.[2] Thus two days before the county of Washington was created by proclamation of Governor St. Clair, county institutions were planted in Michigan by proclamation of George III.[3]

The system thus introduced remained in force, with slight modification, until Michigan ceased to be a part of the royal dominion, in 1796. As required by Jay's treaty of 1794, Detroit and all other western posts still held by the British, were

both civil and criminal cases: Farmer, *Hist. of Detroit and Mich.*, 84; Campbell, *Pol. Hist. of Mich.*, 193.

[1] See the proclamation creating these districts, in *Haldimand Papers: Mich. Pioneer Coll.*, XI, 620–1.

[2] Three judges of common pleas were originally nominated; but two immediately declined to serve, and the people of Detroit sent a memorial to the governor general protesting against the appointments made. Those nominated for the common pleas are merchants, they declare, and therefore will be interested, directly or indirectly, in most cases which may arise; while several of the justices are illiterate and otherwise unfit. A committee of the council was appointed to report on the memorial, and their proceedings are very interesting and instructive. See *Haldimand Papers: Mich. Pioneer Coll.*, XI, 621–49, 655–6. It appears that the first constitution of the court of common pleas was altered; for in Dec., 1788, a session was held at Detroit by a senior justice and four associates: Farmer, *Hist. of Detroit and Mich.*, 174. "Oct. 15, 1792, the name of the District was changed from Hesse to Western District;" and the last court of general quarter sessions under the British rule was held Jan. 29, 1796: *Ib.*, 174.

For a sketch of the early legal history of Michigan, covering the period under review, see Frazer's Introduction to *Mich. Territorial Laws*, I.

[3] The proclamation creating the new districts runs in the name of the king and bears date of July 24, 1788. On the same day the first officers and judges were nominated by the governor. The districts were practically counties. Nov. 8, 1788, Lord Dorchester, the governor general, writes to Lord Sydney: "The Province of Quebec consists at present of seven districts or counties:" *Haldimand Papers*, in *Mich. Pioneer Coll.*, XI, 652.

then surrendered to the United States;[1] and in the same year Acting Governor Sargent of the Northwest Territory laid off the county of Wayne, which embraced all Michigan within its ample limits. Here courts of quarter sessions and common pleas, as provided for in the laws of the territory, were presently established. But, as we have just seen, courts with similar jurisdiction and bearing the same names already existed; and, besides, some of the justices who had served under the provincial authority were continued in their functions.[2] And so the continuity of English county organization under British and American rule was in fact secured.

(c).—*Rise of the Board of Supervisors.*

The institutional history of Michigan now merges in that of the Northwest Territory and Indiana, until its erection into a separate government in 1805. From this time onward

[1] See some interesting details relating to the evacuation of the posts, in Farmer, *Hist. of Detroit and Mich.*, 266–7.

[2] Farmer, *Hist. of Detroit and Mich.*, 190–1, 133. Cf. Campbell, *Pol. Hist. of Mich.*, 205; and his article in *Mag. of West. Hist.*, IV, 453 ff.

Pioneer judicial annals are notoriously rich in anecdote and legend. Thus Green Bay—for a time included in Michigan—boasts a local hero, Judge Charles Reaume, around whom a veritable *muthos* has gathered. He seems to have received his first commission as justice of the peace, either from the British authority, or from Governor Harrison of Indiana Territory; and he long continued to administer the law under various jurisdictions. He is represented as issuing process, in manner oriental, by sending his jack-knife, by way of a signet, to the party summoned. And he appears to have had the eccentric habit of condemning petty offenders to expiate their sentences by physical exercise on the private wood-pile of his honor. On one occasion, greatly to his astonishment, the constable found himself included in the judicial decree, being condemned to split a thousand rails for the court. This he finally consented to do, on condition that the judge would board him during the term of service. See Childs' *Recollections: Wis. Hist. Coll.*, IV, 165–6; Grignon's *Recollections: Ib.*, III, 241, 245–7. Several of his writs and judgments are contained in the *Lawe and Grignon Papers: Ib.*, X, 91–3, 133–5. See also *Wis. Hist. Coll.*, VII, 57 ff.; II, 87–9, 105–7; Campbell, *Pol. Hist. of Mich.*, 160; Strong, *Hist. of Wis. Territory*, 79.

county organization passes rapidly through several phases of development. First was the creation of four judicial[1] districts, in each of which originally a court was held by one of the territorial judges. Below this was the single justice of the peace, possessing a limited civil and criminal jurisdiction. From him appeal lay to the district judges; and from the latter, to the court of the territory.[2] The constitution of the district courts was changed in 1807. It was then enacted that they should henceforth be held by a chief justice and two associates. At the same time they were given certain general administrative functions, similar to those usually exercised by courts of quarter sessions;[3] and thus the district became, in fact, a rudimentary county.

But the new tribunals were of short duration. In 1810 they were abolished, and the cases which they had tried were probably remitted to the territorial court.[4] Below the latter, therefore, the only local tribunal was that of the justice of the peace, whose jurisdiction was now more carefully defined.[5]

Under the wise administration of General Cass all branches of the political organism, local and territorial, entered upon a more vigorous life. Thus, in 1815, he reconstituted the county of Wayne;[6] and in the same year was created a "county court," composed, like the old court of the district, of a chief justice and two associates, and exercising "original and exclusive jurisdiction in all civil cases both in law

[1] *Mich. Territorial Laws*, I, 17–18. But three districts were at first created; later a fourth was formed: Campbell, *Pol. Hist. of Mich.*, 241.

[2] *Mich. Territorial Laws*, I, 21, 37. See also Campbell, in *Mag. of West. Hist.*, IV, 454.

[3] *Mich. Territorial Laws*, II, 7. Another act relative to the district courts was passed in 1809: *Ib.*, II, 68. See also Campbell, *Pol. Hist. of Mich.*, 250–1.

[4] See Campbell, *Pol. Hist. of Mich.*, 263.

[5] *Mich. Territorial Laws*, I, 186–92; II, 125, 129.

[6] *Mich. Territorial Laws*, I, 323. The history of the various changes in the limits of Wayne County—itself an interesting study—is illustrated by a series of maps in Farmer's *Hist. of Detroit and Mich.*, 118–22.

and equity," where the matter in dispute should exceed the competence of a justice of the peace, to the limit of one thousand dollars, and in all criminal offences except capital crimes.[1] Within the next few years many new counties were formed;[2] and each was to have a sheriff, coroner,[3] treasurer,[4] and judge of probate[5]—all appointed by the governor. In 1817 it was enacted that each county should have a court of general quarter sessions, to be composed of the justices of the peace residing therein together with the judges of the county court. The quarter sessions were especially entrusted with the supervision of finance and taxation. The county assessor was their nominee; they were constituted a board of audit and equalization; and they could divide the county into townships.[6] But a portion of the administrative business was reserved to the county court; by which, for example, road-tax lists were revised, taverns and ferries licensed, and the rates of the latter prescribed.[7]

By the acts of 1815 and 1817, it will be observed, the organization of the county as it had existed under the laws of the Northwest Territory was practically restored. The court of quarter sessions, however, endured but a single year. By an act of May 13, 1818, it is abolished, and "all the powers and duties . . . by law vested" therein are transferred to a board of three county commissioners.[8] These were at first nominated by the governor; but in 1825, under authority of

[1] *Mich. Territorial Laws*, I, 184.

[2] *Mich. Territorial Laws*, I, 325–6, 330–6. Vol. I of the *Mich. Pioneer Coll.* is devoted chiefly to the formation and organization of the Michigan counties.

[3] By act of Nov. 3, 1815, a sheriff and a coroner are to be appointed in each county: *Mich. Territorial Laws*, I, 220.

[4] *Mich. Territorial Laws*, II, 114.

[5] Office created in 1818: *Mich. Territorial Laws*, I, 341.

[6] *Mich. Territorial Laws*, II, 109–14.

[7] *Mich. Territorial Laws*, I, 407, 420; II, 98, 101, 516; III, 1071.

[8] *Mich. Territorial Laws*, II, 130.

an act of Congress,[1] the office of commissioner, as well as those of coroner and treasurer, was made elective.[2] The county court, on the other hand, survived until 1833, when it was abolished; to be revived however with elective judges in 1846.[3]

We now come to the last change in the county organism of general constitutional importance. In 1827, as elsewhere noted,[4] representative township-county administration on the New York plan was introduced. The board of commissioners was abolished; and all their powers and functions were transferred to a new body composed of the elective township supervisors.[5] And thus, after many years of experimentation, the essential principles of the highest type of local government were planted in the West.

III.—The County Board.

(*a*).—*Composition and Differentiated Forms.*

The constitution of the county board may fairly be taken as the feature which determines the character of county government. Accordingly throughout the entire west but two general types of organization exist. On the one hand is the commissioner system, by which the superior authority is centralized, usually in the hands of three men; on the other, the supervisor system, by which similar powers are vested in a more or less numerous assembly of township representatives. The first type prevails in the great majority of state and terri-

[1] *U. S. Statues at Large*, IV, 80; *Mich. Territorial Laws*, I, 319.

[2] *Mich. Territorial Laws*, II, 279.

[3] Farmer, *Hist. of Detroit and Mich.*, 192; Campbell, in *Mag. of West. Hist.*, IV, 461.

[4] See Chap. IV, I, (*c*).

[5] *Mich. Territorial Laws*, II, 584. For some account of the legislation of early Michigan, see further Spencer, *Local Government in Wisconsin: Wis. Hist. Coll.*, XI, 502–11.

tories; and, as already seen, it has descended in direct line from the colonial laws of Pennsylvania through those of the Northwest Territory, Ohio, Indiana, and Illinois,—to be variously modified by the legislation of recent times. The second type exists in a small group of states,[1] and we have already traced its evolution from the enactment of the New York assembly in 1703, to its advent in Michigan Territory in 1827.[2]

The board of commissioners usually consists of three members elected for three years, one retiring annually. But in some instances provision is made for a greater number, and for a longer or shorter term.[3]

Whatever the type of organization, the modern county is always a republic in which all offices are elective. Moreover it is of importance to observe, that even under the commis-

[1] The supervisor plan exists in New York, Michigan, and Wisconsin; also in Illinois since 1849, and in Nebraska since 1883. See above Chap. IV, I, (*b*) and (*c*); II, (*a*).

[2] See above Chap. III, IV, and Chap. VIII, I, (*c*).

[3] Commissioners for each county are chosen as follows in various states and territories—the term being three years, unless otherwise stated: Nebraska, 3, or 5 when the population exceeds 70,000; *Compiled Statutes*, 1887, p. 295; Pennsylvania, 3: Brightly's Purdon's *Digest*, I, 378; Illinois, 3: Starr and Curtis' *Annotated Statutes*, I, 157, 1004; Kansas, 3, or 1 for each representative district when the population exceeds 30,000: *Compiled Laws*, 1885, p. 263; Canfield, *Local Government in Kansas*, 19; Iowa, 3 supervisors (= commissioners), but the number may be increased to 5 or 7 by vote of the people: McLain's *Annotated Statutes*, I, 68; Ohio, 3: *Revised Statutes*, 1886, I, 179; Indiana, 3: *Revised Statutes*, 1881, p. 1233: Colorado, 3, or 5 when the population exceeds 10,000: *General Statutes*, 1883, pp. 256–7; Oregon, 2 commissioners who hold office for four years, and form a board only when sitting with the county judge: Hill's *Annotated Laws*, I, 636; II, 1160: Nevada, 3, or 5 when 4,000 votes are polled—chosen for two and four years: *General Statutes*, 1885, pp. 530–1; California, 5 supervisors (= commissioners) chosen for four years: *Statutes*, 1883, p. 301; Wyoming, 3 chosen for two years: *Revised Statutes*, 1887, p. 466; Idaho, 3 chosen for two years: *Revised Statutes*, 1887, p. 238; Dakota, 3: *Compiled Laws*, 1887, p. 150; Minnesota, 3, or 5 where there are 800 voters: *Statutes*, 1878, p. 135; Montana, 3, for four years: *Revised Statutes*, 1879, p. 38; Washington Territory, 3, for two years: *Washington Code*, 1881, p. 463.

sioner system, the principle of local representation is not wholly disregarded. Often the commissioners, though chosen by the voters of the county at large, are each designated for a particular subdivision of the county, known as a "commissioner district," and from the qualified electors thereof.[1] The supervisors are deputies of organized municipal bodies; the commissioners are the representatives of a neighborhood, but a neighborhood which may include several townships or precincts within its limits.

(*b*).—*Relation to the County and the State.*

In new states counties formed from the unorganized domain usually receive their names and boundaries from the legislature. And any unorganized territory, whether laid off as a county or not, may be "attached" to some contiguous organized county for all political or judicial purposes.[2] After a county is created, the next step is organization. The procedure in that case may be illustrated by the Nebraska law:—

Whenever it appears by affidavit of three resident freeholders that the new county has not less than two hundred in-

[1] So in Nebraska: *Compiled Statutes*, 1887, p. 295; Kansas: *Compiled Laws*, 1885, p. 263; Iowa: McLain's *Annotated Statutes*, 1880, I, 69; Indiana, *Revised Statutes*, 1881, p. 1233–4; Colorado: *General Statutes*, 1883, p. 256; California: *Statutes*, 1883, p. 301; Idaho: *Revised Statutes*, 1887, p. 238; Minnesota: *Statutes*, 1878, p. 136; Dakota: *Compiled Laws*, 1887, p. 151. In Washington Territory, two commissioners may not be chosen from the same election precinct, when there are three or more such precincts in the county: *Washington Code*, 1881, p. 463.

[2] In Nebraska unorganized territory may be attached to any adjoining organized county on petition of a majority of the inhabitants of such territory addressed to the commissioners, and a majority vote of the electors, of the county concerned: *Compiled Statutes*, 1887, p. 287. And for purposes of election, revenue, and jurisdiction, any new county until organized, or any other unorganized territory, without vote or petition, is legally attached to the nearest organized county directly east; or, if there be no county lying directly east, then to the organized county directly south, north, or west, in the order named: *Compiled Statutes*, 1887, p. 309.

habitants, the governor, on the receipt of a memorial signed by ten resident taxpayers, shall institute a temporary organization by appointing three "special commissioners" and a "special clerk," named in the memorial, and by designating some place centrally located as a county seat. The temporary commissioners shall immediately proceed to divide the county into convenient precincts; and, on thirty days' notice, order an election for choosing permanent county and precinct officers, and for establishing a permanent county seat.[1]

In like manner, by petition and vote, any territory may be transferred from one county to another. And the same is true of the formation of a new county by division of any already organized; except that the result of the election, when in favor of such division, must be certified by the clerks of the respective counties affected by the change to the secretary of state, who shall notify the governor, whose duty it then becomes to call an election in the new county for the choice of officers.[2] But no such county shall be formed containing an area of less than four hundred square miles.[3] On account of the interests involved, the creation of new counties from old ones is a matter of great importance, requiring the utmost care and deliberation at every step of the procedure. Provision has to be made for continuing existing precinct or township officers in their functions; for the disposition of suits at law pending in the courts; for the division of the property, real and personal, as also of the debts and other liabilities, of all the counties concerned; and for transcription of the old records for use of the new county. In the older states, of course, the gravity of these various interests is greatly en-

[1] *Compiled Statutes*, 1887, p. 283.

[2] *Compiled Statutes*, 1887, pp. 286–7.

[3] Constitution of Neb., Art. X, § I: *Compiled Statutes*, 1887, p. 32. The provision that new counties shall not comprise less than 400 square miles, is found in the laws of various states. See, for example, Constitution of Pa., Art. XIII: Brightly's Purdon's *Digest*, I, 43; Const. of Indiana, Art. XV: *Revised Statutes*, 1881, p. 32.

hanced; and consequently the procedure prescribed by the statutes is sometimes very elaborate.[1]

The county, like the township, is a body politic, possessing the usual powers. But in this capacity its legal representative is the county board, by whom all its functions as a civil corporation are discharged.[2]

(*c*).—*Powers and Duties.*

The western county board is a remarkably powerful body. It may be doubted whether any modern administrative authority, unless indeed it be the council of a city of the higher class, is legally possessed of such wide discretion in the exercise of its functions. Where the commissioner system prevails, the control of several of the most vital interests of the community is entrusted wholly to two or three men, with no remedy save by appeal to the higher courts; and with no other check upon their actions, save their official bond and the ordinary responsibility of elected servants of the people. As a rule, however, these checks are sufficient; county business is usually managed honestly and with tolerable efficiency. Nevertheless the opportunity for local discrimination and arbitrary action is one of the most cogent reasons advanced for the substitution of the supervisor system. On the other hand, it is objected, that the supervisors are unable to conduct county affairs so speedily, intelligently, and impartially as the

[1] See, for example, the law of Pennsylvania: Brightly's Purdon's *Digest*, I, 369 ff.; that of Ohio: Williams' *Revised Statutes*, 1886, I, 172 ff.; and that of Indiana: *Revised Statutes*, 1881, pp. 901 ff. In general on the formation of counties, see Howell's *Annotated Statutes of Mich.*, I, 195 ff. Starr and Curtis' *Annotated Statutes of Ill.*, I, 649 ff.

[2] *Compiled Statutes of Neb.*, 1887, p. 289; McLain's *Annotated Statutes of Iowa*, 1880, I, 61: *Compiled Laws of Kansas*, 1885, p. 262; *Statutes of Minn.*, 1878, p. 133; Hill's *Annotated Laws of Oregon*, II, 1073; *Statutes of California*, 1883, p. 299; *Revised Statutes of N. Y.*, II, 924; Howell's *Annotated Statutes of Mich.*, I, 192; *Revised Statutes of Wyoming*, 1887, p. 465; Starr and Curtis' *Annotated Statutes of Ill.*, I, 653.

commissioners. The board, it is asserted, is too large for the transaction of fiscal and other executive business requiring careful investigation and special knowledge. And it must be confessed, whatever may be the countervailing advantages of the more democratic type of organization, that this objection is sometimes a very serious one, particularly when the county contains within its limits a city or large towns entitled to representation on the board, whether by wards or according to population.[1]

The functions of the county board, in number and character, are practically the same whether it be composed of commissioners or supervisors. But their importance varies according to the degree of centralization. Under the county-precinct system, the authority of the body reaches its highest point. And where the township-county system has been introduced, that authority varies according to the type of organization: being greatest in Indiana, Ohio, and wherever the Pennsylvania plan prevails; and least in Minnesota, and those states, notably Michigan, where the New York plan has been somewhat modified to the advantage of town government.

A concise statement of the powers and duties of the board will now be presented; and we shall be able to gain a correct conception of the general character of western legislation on

[1] In Illinois every town or city with 4000 inhabitants is allowed one additional supervisor; or two, when it contains a population of 6500; and so on increasing one for every additional 2500 inhabitants: Starr and Curtis' *Annotated Statutes*, II, 2416. By the Nebraska statute it is provided that, at the first general election after the adoption of township organization in any county, one supervisor for every 1000 inhabitants "in each city and each village" shall be chosen: *Compiled Statutes*, 1887, p. 387. In Lancaster county, containing the city of Lincoln, township organization was defeated in 1885, when a vigorous effort was made to adopt it, mainly on the ground of the size of the board. It would then have comprised some 50 members. Cf. Bemis, *Local Government in Michigan and the Northwest*, 18, who mentions Judge Cooley's criticism of the supervisor plan. See *Revised Statutes of Wis.*, 1878, p. 237; Howell's *Annotated Statutes of Mich.*, I, 198.

this subject, with the very important advantage of precision, by selecting typical examples.

The board is authorized to hold regular and special meetings. In Wisconsin, the annual meeting of the supervisors occurs on the first Tuesday after the general election, and special meetings may be called by the county clerk on the written request of a majority of the board.[1] The members choose their own chairman annually;[2] a majority is necessary for a quorum; and all meetings are open to the public. As elsewhere, the powers of the county as a body politic are exercised by the board. And at any legal meeting, it is empowpowered to make orders concerning the corporate property, and for the erection, repair, or insurance of county buildings. It may also provide seals for the county and county officers; prescribe the form of all public records; and procure the necessary books, furniture, and supplies for the various departments; make out lists of jurors; purchase grounds,

[1] *Revised Statutes*, 1878, p. 237. In Nebraska the commissioners are required to hold three regular meetings annually: on the second Tuesday of January, the third Monday in June, and the first Tuesday in October. Special meetings may be called by the clerk by publishing the objects of the meeting five days in advance: *Compiled Statutes*, 1887, pp. 295–6. But where the supervisor system has been adopted, two regular meetings occur respectively on the second Tuesday in January and the first Tuesday in June; special meetings being called by the clerk on the written request of at least one third of the members of the board; but all the objects of such meetings must be specified in the notice: *Ib.*, 296–7. Cf. Starr and Curtis' *Annotated Statutes of Ill.*, I, 661; McLain's *Annotated Statutes of Iowa*, I, 69; *Revised Statutes of Indiana*, 1881, p. 1234.

[2] *Revised Statutes*, 1878, p. 238. The chairman of the supervisors is chosen in the same way in Nebraska: *Compiled Statutes*, 1887, p. 297. But where township organization has not been adopted, the rule is different. "In counties not having more than 70,000 inhabitants, the commissioner whose term of office expires in one year, shall be chairman . . . for that year," and in counties having more than 70,000 inhabitants, the board, at the January meeting, chooses its own chairman: *Ib.*, 296. Cf. Howell's *Annotated Statutes of Mich.*, I, 198; Starr and Curtis' *Annotated Statutes of Ill.*, I, 661–2; *Revised Statutes of Idaho*, 1887, p. 239; *Statutes of Minn.*, 1878, p. 137.

not exceeding eight thousand dollars in value, for the use of fairs and exhibitions; levy taxes; examine claims; settle accounts; and represent the county in all cases not otherwise provided for.

Besides these general powers, various duties of a more special nature are prescribed. Thus the supervisors may set off and organize townships and give names to the same; change or vacate town boundaries; appoint commissioners to lay out highways; alter, vacate, or discontinue city, town, and village plats, or state roads; offer bounties for the destruction of wolves, lynxes, or wild cats; change the name of any town, village, or person residing within the county;[1] make rules for the preservation of fish and fix the period during which they may be taken; and incorporate literary or benevolent societies.[2]

But, in various states, the powers conferred upon the board by law are still more comprehensive. Thus, in Nebraska, besides many functions similar to the foregoing, the commissioners may hear complaints, and remove any county officer, for official misdemeanors.[3] On petition of a majority of the sheep owners in the county, they are authorized to appoint a sheep inspector;[4] and they may also construct dams, dykes, or embankments, for protection against high water, when any portion of the county exceeding three hundred and twenty acres is endangered by the probable diversion of the channel of a water course.[5] In like manner they may appoint a probate judge, when the incumbent is absent or disqualified from acting in any cause;[6] approve the sale of lands of wards, ex-

[1] Of course, when legal application is made.

[2] *Revised Statutes of Wis.*, 1878, pp. 237–40.

[3] *Comp. Statutes*, 1887, pp. 310–11; but two members of the board cannot remove the third: 5 Nebraska, 403. The supervisors also have jurisdiction in such cases: 18 Neb., 428.

[4] *Comp. Statutes*, 1887, p. 59. Cf. *Comp. Laws of Kansas*, 1885, p. 927.

[5] *Comp. Statutes*, 1887, p. 314.

[6] *Comp. Statutes*, 1887, p. 336.

cept those of minors;[1] prescribe the number of deputies or assistants of the respective county officers;[2] and discharge various other duties.

But the most important functions of the board are comprehended under the three heads of roads and bridges, support of the poor, and administration of finance and taxation. In each of these departments the commissioners or supervisors possess much discretionary power in the disposition of the public moneys. In Nebraska, road districts are created and highways established, altered, or vacated, by their authority.[3] By them also is granted the right of way to private persons whose lands are enclosed or cut off from the public thoroughfares;[4] and in counties not under township organization, the location and character of all bridges and culverts, where the cost exceeds one hundred dollars, is left solely to their determination.[5] Moreover, when they see fit, they may grade and pave

[1] *Comp. Statutes*, 1887, pp. 345, 351.

[2] *Comp. Statutes*, 1887, pp. 299, 437.

In general on the powers of the county board, see Howell's *Annotated Statutes of Mich.*, I, 199–210; Starr and Curtis' *Annotated Statutes of Ill.*, I, 653–61; *Revised Statutes of Indiana*, 1881, pp. 1235–50; Williams' *Revised Statutes of Ohio*, 1886, I, 180 ff.; *Statutes of Minn.*, 1878, pp. 135–41; *Revised Statutes of N. Y.*, II, 925–52; McLain's *Annotated Statutes of Iowa*, 1880, I, 70–1; *General Statutes of Col.*, 1883, pp. 257 ff.; *General Statutes of Nev.*, 1885, pp. 531 ff.; *Statutes of Cal.*, 1883, pp. 299–300, 303 ff.; *Compiled Laws of Dak.*, 1887, pp. 151 ff.; *Revised Statutes of Idaho*, 1887, pp. 240 ff.; *Revised Statutes of Wyoming*, 1887, pp. 467 ff.

[3] *Comp. Statutes of Neb.*, 1887, pp. 630, 633.

[4] *Comp. Statutes of Neb.*, 1887, p. 632.

[5] *Comp. Statutes of Neb.*, 1887, pp. 637–8. When under township organization, "all contracts for the erection and reparation of bridges and approaches thereto, for the building of culverts and improvements on roads, within the limits of any township, the cost or expense of which shall exceed one hundred dollars, shall be let by the town board to the lowest competent bidder": *Ib.*, 639-40. But the county may aid any township in cases where the cost would be an "unreasonable burden": *Ib.*, 640. Also in counties under township organization, the expense of building and maintaining bridges on public roads over streams shall be borne exclusively by the county: *Ib.*, 641.

streets leading into cities, or construct and repair bridges within any incorporated city or village of the county.[1]

How unrestricted is the authority of the board in the disbursement of the county funds, is well illustrated in their administration of the poor law. All warrants for the expenses incurred by the local overseers are drawn by order of the board; and they are authorized to employ a county physician at a cost of not to exceed two hundred dollars a year. They may also, whenever they see fit, and without vote of the people, purchase a farm of not more than six hundred and forty acres, and erect thereon a poor-house, with other necessary buildings. For this purpose, they are authorized, from time to time, to levy a tax on the taxable property in the county of not to exceed one per cent. of the assessed valuation. They may also appoint agents or superintendents for the management of the institution, and order all necessary expenditures for the support of the same; which expenditures are discharged from the levy for general county purposes.[2]

Already in the days of Aethelred its fiscal business was a characteristic feature of shire administration. Such is still the case. Everywhere the supervisors or commissioners are given the levy of the county charge. Moreover, in the majority of states, all accounts must be allowed by them; and they are constituted a board for the equalization of assessments.[3]

[1] *Comp. Statutes of Neb.*, 1887, pp. 627, 633. Cf. *Revised Statutes of Wis.*, 1878, p. 240, where the county board is authorized to grant charters to persons to maintain toll or free bridges, turnpike or plank roads, and ferries.

[2] *Comp. Statutes of Neb.*, 1887, pp. 547–8, 598. Cf. Starr and Curtis' *Annotated Statutes of Ill.*, II, 1738-40; Brightly's Purdon's *Digest of Pa.*, II, 1341. In Ohio the county commissioners may establish orphan asylums and appoint the directors: Williams' *Revised Statutes*, 1886, I, 193. They may also nominate the trustees of children's homes and superintendents of infirmaries: *Ib.*, 194, 200. See *Comp. Laws of Kansas*, 1885, p. 598, 600; McLain's *Annotated Statutes of Iowa*, I, 71; Howell's *Annotated Statutes of Mich.*, I, 200–1.

[3] Such is the case in Nebraska: *Comp. Statutes*, 1887, pp. 290, 596, 598; Kansas: *Comp. Laws*, 1885, p. 960; Ohio: Williams' *Revised Statutes*, 1886, I, 549, 187; *Revised Statutes of Ind.*, 1881, p. 1236; Washington Territory: *Washington Code*, 1881, pp. 496, 498.

But in some instances a departure is made from the general type of fiscal arrangements. Thus, in Oregon, the place of the ordinary board is taken by a "county court" composed of the county judge and two commissioners. This body is entrusted with the levy of taxes and the general civil business; but there is a separate board of equalization consisting of the county judge, clerk, and assessor.[1] In Kansas, for counties having over twenty-five thousand inhabitants, there is a county auditor, to whom the clerk is required to certify all claims. These are then reported back to the clerk with the auditor's approval or disapproval. But the commissioners may disallow any claim, even after the auditor's sanction.[2] The board of equalization, in Minnesota, consists of the county auditor and the commissioners. In Indiana it is composed of the commissioners and four freeholders, residing in different parts of the county, nominated by the judge of the district court.[3] A peculiar plan, for special cases, exists also in Ohio. Here, in addition to the commissioners, there is, for each county of 180,000 inhabitants containing a city of the first class within its limits, a separate "board of control," composed of five members elected for three years. The body chooses its own clerks and establishes its own rules of procedure; and it has "final action and jurisdiction in all matters involving the expenditure of money, or the awarding of contracts, or the assessing or levying of taxes, by the board of county commissioners." The latter body is required to report its proceedings to the board of control. Provision is also made for a joint meeting of the two boards for the purpose of prescribing rules for their official intercourse, and the forms to be observed in certain fiscal transactions.[4]

But in the administration of finance, as in various other

[1] Hill's *Annotated Laws*, II, 1294 ff.
[2] *Comp. Laws of Kansas*, 1885, pp. 294–5.
[3] *Revised Statutes of Indiana*, 1881, p. 1383.
[4] Williams' *Revised Statutes*, 1886, I, 208–11.

departments of civil government, the most complex methods prevail in Pennsylvania. Every county has a triple authority. The board of three commissioners discharge the usual miscellaneous functions. To them, for example, belong the construction and repair of bridges,[1] the oversight of the poor,[2] the letting of contracts for public works,[3] and the levy of taxes.[4]

But the accounts of the commissioners are subject to the approval of the board of auditors, consisting like the former, of three members elected for three years, one retiring annually.[5] The statute carefully excludes interested parties from serving upon the board. No guardian of the poor, inspector of prisons, controller of public schools, member of the board of health, nor any person employed in the office of sheriff, treasurer, or county commissioners, is eligible. The regular meeting occurs on the first Monday of January; but special meetings may be held. Two members constitute a quorum; and it is their duty to audit the accounts of the sheriff, treasurer, and coroner, as well as those of the commissioners and the officers entrusted with the care of the poor. Appeal from their decisions lies to the county court of common pleas.[6]

Superior in some particulars to either the commissioners or the auditors, is the court of quarter sessions, held by judges of the common pleas.[7] The ancient administrative functions of this body have survived with wonderful tenacity. Besides a limited criminal jurisdiction, it possesses an extensive civil authority. Thus the quarter sessions are required to approve the official bonds of the commissioners; and a vacancy in the

[1] Brightly's Purdon's *Digest*, II, 1506–7.
[2] Brightly's Purdon's *Digest*, II, 1341.
[3] Brightly's Purdon's *Digest*, I, 366 ff., 380.
[4] Brightly's Purdon's *Digest*, II, 1582 ff., 1610, etc.
[5] Brightly's Purdon's *Digest*, I, 43–4, 375.
[6] Brightly's Purdon's *Digest*, I, 375–7.
[7] Brightly's Purdon's *Digest*, II, 1401.

latter body is temporarily filled by them acting jointly with the surviving members.[1] They may also establish school districts,[2] incorporate boroughs,[3] erect, change, or divide townships,[4] alter election districts,[5] approve constables' bonds and fill vacancies in that office,[6] license taverns and peddlers,[7] and nominate certain town officers on failure of the people to elect.[8] Finally the commissioners are authorized to erect county buildings and borrow money for that purpose only after receiving the approval of the quarter sessions and two successive grand juries.[9]

IV.—The County Officers and Their Functions.

(*a*).—*The Clerk, Auditor, and Register.*

Administratively the clerk is the most important officer of the county. He has inherited a portion of the duties of the ancient clerk of the peace; and as custodian of the county records, he also represents the English *custos rotulorum.*

Primarily he is secretary of the county board, being re-

[1] But one of the justices of quarter sessions may approve the commissioner's bond: Brightly's Purdon's *Digest*, I, 378–9.

[2] Brightly's Purdon's *Digest*, I, 283.

[3] Brightly's Purdon's *Digest*, I, 196–7.

[4] Brightly's Purdon's *Digest*, I, 371.

[5] Brightly's Purdon's *Digest*, I, 40, 676.

[6] Brightly's Purdon's *Digest*, I, 316.

[7] Brightly's Purdon's *Digest*, II, 1077, 1308.

[8] Brightly's Purdon's *Digest*, II, 1638.

[9] Brightly's Purdon's *Digest*, I, 366–7. This power of the grand jury is also handed down from the eighteenth century.

A dual fiscal authority exists in Michigan for Wayne county which includes the city of Detroit. There is, first, the board of supervisors for the equalization of taxes and for the apportionment of the county and state taxes among the towns. All other ordinary duties of the supervisors, including the levy of taxes, belong to a second board of three auditors: Howell's *Annotated Statutes*, I, 210–11. Cf. Farmer, *Hist. of Detroit and Mich.*, 124.

quired to attend its meetings, record its proceedings, preserve its official documents, and countersign all warrants drawn upon the treasury.

Where the more centralized forms of county government exist, the clerk, in addition to the functions growing directly out of his relations to the board, performs a vast number of special duties of an executive and secretarial nature. He acts as a check upon the treasurer, keeping an account of all receipts and expenditures. In Kansas he is required to certify to the secretary of state the names and boundaries of all new townships formed, or any change in town boundaries; assess property when the assessors have failed so to do; countersign the treasurer's receipts; file lists of officers with the secretary of state; administer oaths; and submit annually to the state auditor a financial exhibit of the revenues and expenditures of his county.[1] Furthermore it is his duty to issue certificates of election to town officers;[2] deliver lists of taxable real estate to the assessors;[3] publish meetings of the board of equalization;[4] keep a record of strays;[5] make return of the census;[6] and execute deeds in fee simple to unredeemed lands sold for delinquent taxes.[7]

Similar functions are discharged by the clerk in New York,[8] Michigan,[9] Illinois,[10] Wisconsin,[11] Nebraska,[12] Oregon,[13]

[1] *Comp. Laws of Kan.*, 1885, pp. 272–3.
[2] *Comp. Laws of Kan.*, 1885, p. 985.
[3] *Comp. Laws of Kan.*, 1885, p. 955.
[4] *Comp. Laws of Kan.*, 1885, p. 960.
[5] *Comp. Laws of Kan.*, 1885, p. 923.
[6] *Comp. Laws of Kan.*, 1885, p. 132.
[7] *Comp. Laws of Kan.*, 1885, p. 972.
[8] *Revised Statutes*, I, Index.
[9] Howell's *Annotated Statutes*, I, 58: Constitution, Art. X.
[10] Starr and Curtis' *Annotated Statutes*, I, 157: Constitution, Art. X, § 8.
[11] *Revised Statutes*, 1878, pp. 248–50.
[12] *Comp. Statutes*, 1887, pp. 298–302.
[13] Hill's *Annotated Laws*, I, 98; Constitution, Art. VII, §§ 6, 7.

Colorado,[1] and Wyoming;[2] and by the county auditor—who takes the place of the clerk—in Ohio,[3] Indiana,[4] Minnesota,[5] Iowa,[6] Washington,[7] and Idaho.[8] But in several instances provision is made for both offices; and in that event the clerk performs the usual secretarial duties, while the special business of examining claims and accounts is relegated to the auditor.[9] But whatever the plan, the county board is generally the superior authority for the settlement of claims.

Two other important county officers are the recorder or register of deeds[10] and the clerk of the district or circuit

[1] *General Statutes*, 1883, pp. 266 ff.

[2] *Revised Statutes*, 1887, pp. 474 ff.

[3] Williams' *Revised Statutes*, 1886, I, 212–23, 181.

[4] *Revised Statutes*, 1881, p. 1267.

[5] *Statutes of Minn.*, 1878, pp. 141–4.

[6] McLain's *Annotated Statutes*, I, 79–80.

[7] *Washington Code*, 1881, pp. 470–3.

[8] Here the recorder of deeds is *ex officio* auditor: *Revised Statutes*, 1887, pp. 249, 276.

[9] Such, as we have seen, is the case in Kansas and Michigan for populous counties; and the special auditing boards of Ohio and Pennsylvania have also been discussed. Each county in California may have a clerk and an auditor, but the offices may be combined in the same hands: *Statutes of Cal.*, 1883, p. 315. A similar law exists in Dakota; but when there is also a register, then the clerk is *ex officio* auditor: *Compiled Laws*, 1887, pp. 164–6.

[10] Thus, in Nebraska, a register is elected in every county having at least 18,003 inhabitants; otherwise the duty of recorder is performed by the county clerk: *Comp. Statutes*, 1887, p. 298–9. Separate registers or recorders are chosen in Kansas: *Comp. Laws*, 1885, p. 405; Ohio: Williams' *Revised Statutes*, 1886, I, 235–9; Indiana: *Revised Statutes*, 1881, p. 1272; Wisconsin: *Revised Statutes*, 1878, p. 246; Minnesota: *Statutes*, 1878, pp. 150–3; Iowa: McLain's *Annotated Statutes*, I, 157–8; and Oregon: Hill's *Annotated Laws*, II, 1139. The offices of clerk and register are combined in Wyoming: *Revised Statutes*, 1887, pp. 474–8; and in Colorado: *General Statutes*, 1883, p. 266. They may be united in Michigan: Howell's *Annotated Statutes*, I, 225–6; Constitution, Art. X: *Ib.*, I, 58; also in California: *Statutes*, 1883, p. 315. In Idaho the recorder is *ex officio* auditor: *Revised Statutes*, 1887, p. 249; in Dakota, either the register is *ex officio* clerk, or the clerk is *ex officio* auditor: *Comp. Laws*, 1887, pp. 163–6.

court.[1] These are often separately chosen by the electors; but in administrative practice, their duties sometimes devolve upon the auditor or clerk.

(*b*).—*The Treasurer and Assessor.*

Politically the county treasurership is the most important local office in the gift of the people, since it is the most lucrative. As custodian of the county funds and temporarily of the state, and sometimes of village and city, revenue derived from taxation, the treasurer is, of course, a very responsible officer; and he is required to execute a heavy bond for the faithful discharge of his trust. He always receives a liberal salary, graduated, as a rule, according to the population of the county for which he is chosen.[2] Besides this is the advantage,

[1] In Nebraska a clerk of the district court is quadrennially chosen in every county having a population of 8000 inhabitants; in other counties the clerk officiates: *Comp. Statutes*, 1887, p. 387. In each county a clerk is separately elected for the common pleas in Ohio: Williams' *Revised Statutes*, 1886, pp. 254–9; for the circuit court in Wisconsin and Indiana: *Revised Statutes of Wis.*, 1878, p. 246; *Revised Statutes of Ind.*, 1881, pp. 1253–9; for the district and circuit courts in Iowa: McLain's *Annotated Statutes*, I, 157–8. In Illinois there is an elective clerk of the circuit court, who, however, is *ex officio* register of deeds, except in counties having 60,000 inhabitants, when a separate recorder must be chosen: Starr and Curtis' *Annotated Statutes*, I, 157, 1004. But the county clerk is *ex officio* clerk of the circuit court in Michigan: Howell's *Annotated Statutes*, I, 52: Constitution, Art. VI; of the courts of record in Nevada: *General Statutes*, 1885, p. 32: Constitution, Art. IV; and of the superior and county courts in New York: *Revised Statutes*, I, 344.

[2] At present, in Nebraska, the treasurer, like the clerk, sheriff, and county judge, is allowed certain fees; but in counties having less than 25,000 inhabitants, when the fees amount to more than 2000 dollars a year, the excess must be turned into the treasury; elsewhere he receives a salary of 3000 dollars a year. But in other states a much higher salary is often paid. In Kansas the fees collected by the treasurer and clerk are deducted from their salaries: *Compiled Laws*, 1885, p. 277. In California, for the purpose of grading the compensation of officers, the counties are arranged in 48 classes: *Statutes of 1883*, pp. 332–5; *Statutes of 1885*, pp. 195–8; and, similarly, in Idaho, there are 5 classes: *Revised Statutes*, 1887, p. 275.

often much more important than the salary, which he derives from deposits of the public moneys: a practice tolerated by the community, but not contemplated by the law.

The county treasurer is usually *ex officio* collector of the county and state taxes.[1] By the Nebraska statute, where township organization has not been introduced, he is moreover the collector of taxes levied in villages and in cities of the second class;[2] but where such organization has been adopted, the local treasurers are the collectors.[3] In the former case, the county treasurer is required, on proper demand, to pay to their respective treasurers all moneys collected by him for school districts, villages, or cities; in the latter, the local collectors must settle with the county treasurer, accounting for all funds save those levied for their own districts. And, furthermore, it is the duty of the county treasurer to settle annually with the auditor of public accounts, and pay over when required all moneys due the state.[4]

Generally the assessment of taxes is entrusted to precinct or township officers. But in several states and territories a county assessor appears. Such is the case in Missouri,[5] Washington,[6] Dakota,[7] California,[8] Oregon,[9] Nevada,[10] Colorado,[11] and Wyoming;[12] while in Illinois, the treasurer is *ex officio* assessor

[1] Each county is authorized to elect a separate collector in California; but the office may be combined with that of treasurer: *Statutes*, 1883, p. 315. There is also a county collector in Missouri: Shannon, *Civil Govt.*, 308.

[2] *Comp. Statutes*, 1887, pp. 190, 205.

[3] *Comp. Statutes*, 1887, pp. 600–4.

[4] *Comp. Statutes*, 1887, pp. 616–17, 696–7.

[5] Shannon, *Civil Government*, 309.

[6] *Washington Code*, 1881, p. 477. But in some counties the sheriff acts.

[7] *Comp. Laws*, 1887, p. 150.

[8] *Statutes*, 1883, p. 315.

[9] *Hill's Annotated Laws*, II, 1160.

[10] *General Statutes*, 1885, pp. 568, 570. But the duties of the office are performed by the sheriff.

[11] *General Statutes*, 1883, pp. 280–1.

[12] *Revised Statutes*, 1887, pp. 480–1.

in counties where township organization has not been established.[1] But to facilitate the administration of his office, the county is usually divided into districts and the assessor is authorized to appoint deputies.

(*c*).—*The Sheriff, Coroner, Surveyor, and Superintendent.*

The western sheriff is perhaps not equal in rank and social prestige to the Norman vicecomes, nor even to the contemporary magistrate of the English shire. Nevertheless the office is one of dignity and power. Though chosen by the electors of his district, he is still the representative of the majesty of the state; and, practically, he still remains the constitutive officer of the county. For whatever functionary may be dispensed with, without a sheriff there is no shire. The emoluments of the office are only second in importance to those of the treasurer; and consequently the post is usually the object of sharp political rivalry.

The statutory provisions relating to the duties of the sheriff are everywhere much the same. He is always a peace magistrate and the ministerial officer of the higher courts; while, here and there, a trace of his original fiscal power survives.[2]

Other elective officers of every western county are the coroner, whose functions are important, especially in populous districts; the land surveyor, whose office has descended from colonial times; and the superintendent, who is entrusted with the examination of teachers, the visitation of schools, and the apportionment of the public school funds among the various districts of the county.

[1] Starr and Curtis' *Annotated Statutes*, I, 1003.

[2] Thus, in Nebraska, the sheriff was originally *ex officio* county assessor: see the Code of 1855–6: *Comp. Session Laws of Neb.*, I, 238–9; and such is the case in Nevada: *Gen. Statutes*, 1885, p. 568. In California the offices of sheriff and collector may be united: *Statutes*, 1883, p. 315; and they are united in Oregon: Hill's *Annotated Laws*, II, 1300 ff. In Washington the sheriff is sometimes county assessor: *Code*, 1881, p. 477.

(*d*). — *The Prosecuting Attorney, Public Administrator, and County Judge.*

Besides the prosecuting attorney, chosen like other officials by popular vote, the only important[1] officers of the county not already mentioned are the public administrator and the county judge. The duties of the former, as the name implies, are concerned with the administration of estates; but they are usually performed by the county judge.[2]

The higher civil and criminal jurisdiction formerly belonging to the county courts of common pleas and quarter sessions is now vested chiefly in the circuit or district court.[3] But there is still, in many states, a county court presided over by a single elective judge. This tribunal usually exercises original and exclusive jurisdiction in matters of probate, administration, and guardianship. Sometimes it possesses a wider com-

[1] Occasionally, however, other officers appear. Thus, in Nevada, each county, when necessary, may have an *elisor*, appointed by the judge of probate or other judge, to execute process in the absence or disability of the sheriff: *General Statutes*, 1885, p. 581. In New York there are elective county superintendents of the poor: *Revised Statutes*, III, 1873; also a sealer of weights and measures appointed by the supervisors: *Ib.*, II, 1848; and commissioners of turnpikes in certain counties: *Ib.*, I, 348. Some counties in Washington choose wreck masters: *Code*, 1881, pp. 484–8.

[2] Public administrators are chosen in Nevada, where they are *ex officio* coroners: *General Statutes*, 1885, pp. 593 ff.; in California, where the office may be combined with that of coroner: *Statutes*, 1883, p. 315; but in Idaho the county treasurer is *ex officio* administrator: *Revised Statutes*, 1887, pp. 643, 249.

[3] The district or circuit court, like the courts of the itinerant justices under Henry II and his successors, is, in an important sense, a court of the shire. The district may comprise several counties; but the court is held "in and for" each particular county, and its mesne processes do not usually run beyond the county limits. In Nebraska, however, final process runs throughout the state; and the jurisdiction of the judge "at chambers" may be exercised anywhere in his district. But in general with respect to the serving of processes, the authority of the court is precisely the same for any other county of the state as it is for any county of the district in which it is not sitting.

petence. Thus, in Nebraska, the county judge is granted the ordinary powers of a justice of the peace; and, in civil cases, a jurisdiction concurrent with that of the district court in any sum not exceeding one thousand dollars. But he is expressly prohibited from trying actions for malicious prosecution, official misconduct, slander or libel, and those relating to the sale or title of real estate.[1] Various other duties are prescribed by law. Thus he may appoint persons to assess damage for right of way, issue marriage licenses and record marriage certificates, prosecute tramps, commit children to the reform school, enter decrees of adoption, and try contested elections.[2]

Such is the general character of the modern county court in its most developed form.[3] Only in one or two instances, in the group of states under consideration, have traces of the judicial system of the colonial period been partially preserved. Thus, in New York, "courts of sessions" are held by the county judge and two justices of the peace.[4] And in Pennsylvania, courts of common pleas and quarter sessions are still maintained. But these are now composed of the same members—a president and two associate judges. The common pleas are authorized to try all "causes civil, personal, and mixed;" while the quarter sessions, in addition to their

[1] *Comp. Statutes*, 1887, p. 331.

[2] On these powers, see *Comp. Statutes*, 1887, pp. 249, 504–5, 583, 831, 396.

[3] Probate judges are chosen in Michigan: Howell's *Annotated Statutes*, I, 53: Const., Art., VI; Dakota: *Comp. Laws*, 1887, p. 150; Minnesota: *Statutes*, 1878, pp. 157, 572; Kansas: *Compiled Laws*, 1885, p. 280; Idaho: *Revised Statutes*, 1887, pp. 249, 251.

There is a county judge in Illinois: Starr and Curtis' *Annotated Statutes*, I, 134: Const., Art. VI, § 18; and in counties having 50,000 inhabitants also a probate judge: Const., Art. VI, § 20; in Wisconsin: *Revised Statutes*, 1878, pp. 282–3; Oregon: Hill's *Annotated Laws*, I, 636, 101–2. Cf. Stimson, *American Statute Law*, 119, 126.

[4] *Revised Statutes*, III, 2364–5, 2377, 2544–5; Const., Art. VI, § 15: *Ib.*, I, 97. Cf. Stimson, *American Statute Law*, I, 117.

criminal jurisdiction, still participate in the work of civil administration.[1]

V.—The County in the East and South.

(*a*).—*Rise of Elective Commissioners in New England.*

The evolution of local organisms in the West constitutes a remarkable era in the history of English institutions. A hundred years of experiment have produced results of great constitutional significance. The proper balance of local authorities has been restored. The township, the county, and the state have each been assigned their just share in the work of self-government. And that these results are of really national importance, we shall better appreciate, if we now examine the history of county organization in the East and South. For the changes of most general interest which have occurred, or are gradually taking place, in those regions, consist in the introduction of the county board and the adoption of the principle of election in the choice of officers; while here and there, as the social conditions become more favorable, the rudiments of the co-operative township-county system are making their appearance. And who will doubt that these innovations are due in part, especially in the southern and southwestern states, to the influence of previous experience in the West?

But in New England, with respect to the powers and uses of the county, no real progress has been made. The county is still a feeble organism employed for a limited number of

[1] "Judges of the courts of common pleas learned in the law shall be judges of the courts of oyer and terminer, quarter sessions of the peace, and general jail delivery, and of the orphans' court, and within their respective districts shall be justices of the peace as to criminal matters:" Const., Art. V, § 9: Poor, *Charters*, II, 1580; Brightly's Purdon's *Digest*, I, 36, 268–79. Cf. Chap. VIII, III, (*b*).

purposes. Indeed in some cases it is of even less governmental significance than it was in the seventeenth century.

Thus, in Rhode Island—to begin with the body in its most rudimentary condition—each of the five counties is merely a circumscription for the holding of courts, and for the election of a sheriff and the clerks of the supreme court and the court of common pleas.[1]

Each county in Vermont chooses one commissioner annually, whose duty it is to appoint agents for the various towns, to sell spirituous liquors for medicinal, chemical, and mechanical purposes.[2] Besides this, the county court exercises a higher jurisdiction in certain questions connected with the highway administration.[3] But all real local authority belongs to the towns.

Somewhat more developed is the organization in Connecticut. The state is divided into eight counties, for each of which three commissioners are periodically appointed by the general assembly.[4] They are entrusted with the care of the county property and may purchase and sell real estate on its behalf; but all conveyances are made in the treasurer's name. To them also belongs the oversight of the county jail, and they may fix the number of employes, jailors, and other officers.[5] They are authorized to assess damages caused by the coast survey;[6] establish rules for the government of county work-houses;[7] and levy money for the repair of the

[1] *Public Statutes*, 1882, pp. 39, 74. A court of common pleas is held in each county by some one or more of the justices of the supreme court *Ib.*, 510.

[2] *Revised Laws*, 1880, pp. 732–3.

[3] *Revised Laws*, 1880, pp. 209, 570–2. But a representative county convention is held quadrennially to equalize the assessment of lands. It is composed of delegates appointed from their own members by the town listers: *Ib.*, 124–5.

[4] *General Statutes*, 1888, pp. 2, 429–30.

[5] *General Statutes*, 1888, pp. 740 ff.

[6] *General Statutes*, 1888, p. 412.

[7] *General Statutes*, 1888, p. 748.

court-house or jail, when the cost does not exceed six hundred dollars.[1]

But by a curious arrangement, the superior authority in fiscal matters is given to a joint assembly of the state senators and representatives for the county. This body is required to meet biennially at a suitable place in the state capitol designated by the speaker of the house. The meeting is called to order by the representative who is senior in years, after which a chairman and a clerk are chosen. The business of the assembly consists in making specific appropriations for any of the items of county expenditure; estimating and apportioning the county taxes; and in appointing from their own number two auditors to examine the accounts of the treasurer, commissioners, and jailor. And at any time when the commissioners think a special tax is needed, they may call the body together to make the levy.[2]

The remaining officers of the county are the coroner, appointed every three years by the judges of the superior court on recommendation of the state's attorney; the treasurer, nominated by the commissioners; and the sheriff, chosen quadrennially by popular vote.[3]

A novel system prevails likewise in New Hampshire. Here the elective principle is thoroughly carried out; each of the ten counties choosing every two years a sheriff, treasurer, solicitor, register of deeds, register of probate, and three commissioners.[4]

[1] The cost of such repairs may be apportioned among the towns, when such cost can not be defrayed from the county treasury: *General Statutes*, 1888, p. 432.

[2] *General Statutes*, 1888, pp. 432–3. At such special meetings the clerk of the superior court is secretary.

[3] *General Statutes*, 1888, pp. 189, 430, 434–6. In several counties of Connecticut a court of common pleas is held by judges appointed by the general assembly: *Ib.*, 178, 185. Probate business does not belong to the county; but the state is divided into a large number of districts in each of which a judge of probate is biennially elected: *Ib.*, 46–50, 107.

[4] The state is divided into 10 counties: *General Laws*, 1878, pp. 80–2, 89.

But the commissioners possess little independent authority. In all important matters they are subject to the control of a "county convention," which is composed of the "representatives of the towns of the county."[1] The regular meeting of the convention occurs biennially in June, notice being given by the speaker of the house of representatives. The body elects its own chairman and clerk; levies the county taxes; and authorizes the commissioners to issue bonds and to repair buildings whenever the cost shall exceed one thousand dollars. Moreover it is empowered to choose biennially two auditors of accounts, who, by a singular provision, are to be selected "one each from the two leading political parties."[2]

The county commissioners, however, may elect from their own number a clerk to record their proceedings; have the care of county property; take charge of paupers; and lay out highways. But they are allowed to establish houses of correction and purchase or convey real estate, only when authorized by the convention.[3]

More varied and more important are the powers of the county in Maine, where the entire supervision of the financial business is entrusted to three elective commissioners.[4]

But it is in Massachusetts, now as formerly, that New England county government reaches its highest development. And here the point of chief historical interest is the genesis of the elective board.

Until 1828 the civil administration of the county, originally vested in the general sessions of the peace, was exercised by a court of "sessions," composed of a chief justice and two associates, appointed by the governor.[5] But already in 1826

[1] *General Laws*, 1878, p. 88. Note that senators are not included as they are in Connecticut.

[2] *General Laws*, 1878, pp. 87–8, 91–2.

[3] *General Laws*, 1878, pp. 90–2, 176 ff.

[4] *Revised Statutes*, 1883, pp. 644–48; and Index.

[5] In 1814 the powers of the former courts of sessions were transferred to new "circuit courts of common pleas;" but by an act of Feb. 20, 1819, the

an important step was taken in the differentiation of a new authority for the management of civil affairs. By an act of that year, the laying out of public roads in each county was given to five commissioners of highways, to be appointed by the governor for a term of five years.[1] This is the germ of the board of commissioners in Massachusetts; and it is interesting to observe that here it was the management of highways for which a body separate from the court of sessions was first required; whereas, in New York and Pennsylvania, the supervisors and commissioners were originally employed solely for the administration of taxation and finance.

Two years later, in 1828, appeared a statute by which was outlined the principal features of county organization as it still exists. The governor is authorized to appoint three or four commissioners for each county, who are to perform all the duties of the commissioners of highways as well as the general functions of the courts of sessions. Besides the regular or "standing" commissioners two "special" commissioners are to be appointed for each county; and these are to serve as substitutes when any of the standing commissioners are disqualified from acting.[2]

Finally, in 1835, both classes of commissioners were made elective.[3] And so it appears that not until ten years after their advent in Michigan, were county commissioners instituted in Massachusetts; and in the latter state they were not chosen by popular vote until thirty-one years after they were so chosen in Ohio, and eight years after the elective town supervisors had superseded them in Michigan.[4]

latter tribunals were abolished and their jurisdiction again vested in courts of sessions: *Laws of Mass.*, 1819, pp. 189–92. The courts of "general sessions of the peace" appear to have survived until the act of June 19, 1809: *Laws of Mass.*, 1809, pp. 22–3.

[1] *Laws of Mass.*, 1826, pp. 304–6.

[2] Act of Feb. 26, 1828: *Laws of Mass.*, 718–28.

[3] *Revised Statutes of Mass.*, 1836, pp. 160 ff.

[4] See above Chap. X, I, (*h*), II, (*c*). But whether the origin of commis-

At present Massachusetts has fourteen counties. The officers are a treasurer, a sheriff, three commissioners of insolvency,[1] a register of deeds,[2] a district attorney, a register of probate and insolvency, and a clerk of the courts. These as well as the three regular and the two special commissioners are all chosen by popular vote.

The commissioners possess somewhat more extended powers than in the other New England states. It is their duty to provide for the erection and repair of county buildings; to levy and apportion the county taxes; equalize assessments;[3] license ferries and prescribe tolls therefor;[4] and alter, discontinue, or lay out highways from town to town.[5] They may also examine the accounts of the treasurer; audit the fees of medical examiners;[6] divide the county into representative districts;[7] superintend houses of correction; provide houses of reformation for juvenile offenders and enact rules therefor;[8] establish truant schools;[9] hear appeals from boards of health on their refusal to abate nuisances;[10] regulate fast driving on county bridges; and perform various other special duties prescribed by law. But, on the whole, the supervisory

sioners in Massachusetts is due mainly to the influence of the middle and western states; or whether it may be regarded as a reminiscence of the colonial practice of choosing commissioners for the equalization of taxes and other purposes, is an interesting question which, so far as I am aware, has never been investigated. But at any rate, the assertion sometimes made that the commissioner system was carried from Massachusetts into the Northwest, is without foundation.

[1] But Worcester county has four: *Public Statutes*, 1882, p. 92.

[2] Or one for each "district for the registry of deeds" when the county is divided: *Public Statutes*, 1882, p. 92.

[3] *Public Statutes*, 1882, pp. 110, 207–10.

[4] *Public Statutes*, 1882, pp. 358–9.

[5] *Public Statutes*, 1882, pp. 324 ff.

[6] *Public Statutes*, 1882, p. 223.

[7] *Public Statutes*, 1882, p. 44.

[8] *Public Statutes*, 1882, pp. 1223–5.

[9] *Public Statutes*, 1882, p. 319.

[10] *Public Statutes*, 1882, p. 441.

authority of the commissioners with respect to the towns is not equal to that of the quarter sessions in colonial days.

In conclusion it may be noted that the ordinary civil and criminal jurisdiction of the old county courts is now vested partly in the superior court sitting in the various counties;[1] partly in the court of probate;[2] and partly in the "trial justices:" the latter being specially designated by the governor for the trial of petty civil and criminal causes.[3]

(*b.*)—*Transformation of the County in Virginia.*

The primitive constitution of the Virginia county by which almost the entire administrative authority was centered in the hands of the justices of the peace, was maintained with slight modification until after the Civil War. At an early day, however, the business of assessment was handed over to "commissioners of the revenue"; and by the constitution of 1851, the people in each magisterial district—a division of the county at that time introduced—were allowed to elect four justices of the peace.[4] The county court thus became an assembly of district representatives, similar in this regard to the county commissioners of the West.

No further important change was made until the legislation of the reconstruction period, which has finally resulted in the differentiation of the county court into two distinct bodies: the board of supervisors, who are given control of the financial business; and the new county court, held by a "county court judge," who, in addition to his ordinary judicial competence,

[1] *Public Statutes*, 1882, p. 841 ff. This court is composed of one chief justice and ten associates; but any one or more are competent to hold a legal session.

[2] Held in each county by the "judge and register of probate:" *Public Statutes*, 1882, pp. 871–7.

[3] From two to thirty trial justices are nominated in each county for a term of three years: *Public Statutes*, 1882, pp. 862–70.

[4] Constitution, Art. VI, § 27: Poore, *Charters*, II, 1935.

retains a very large share of the general civil authority. In accordance with the requirement of the constitution of 1870, as we have seen,[1] the New York system of township-county government was introduced, with a full corps of elective county officers and a board composed of the township supervisors.[2] This system was abrogated in 1874; but the new county court and the board of supervisors were both retained; the latter being now composed of supervisors chosen, not in townships, but in magisterial districts which practically correspond to the precincts in those western states which have not adopted township organization.[3] Let us now see how the work of administration is distributed by this dual arrangement.

The board of supervisors meets regularly on the fourth Monday of July; but special meetings may be called on the written request of two members addressed to the clerk of the board. The body chooses its own chairman. Its duties are primarily concerned with finance. By it county and school taxes are levied; accounts are audited; and claims allowed. As usual, also, the board is entrusted with the erection, repair, and insurance of the public buildings;[4] and it is authorized to levy money for the support of the poor;[5] to negotiate loans;[6] establish hospitals;[7] offer premiums for the destruction of noxious animals;[8] and exercise various other powers.

On the other hand appeal from the action of the supervisors in making the levy or auditing claims, lies to the county court.[9] The latter may also revise assessments;[10] remove county

[1] See above, Chap. IV, x, (*b*).
[2] See the act of July 11, 1870: *Acts of the Assembly*, 1869–70, pp. 257–66.
[3] *Acts of the Assembly*, 1874–5, pp. 354 ff.
[4] *Code of Va.*, 1887, pp. 253 ff.
[5] *Code of Va.*, 1887, p. 264.
[6] *Code of Va.*, 1887, pp. 346–7.
[7] *Code of Va.*, 1887, p. 448.
[8] *Code of Va.*, 1887, p. 256.
[9] *Code of Va.*, 1887, pp. 257–8.
[10] *Code of Va.*, 1887, p. 196.

and district officers;[1] rearrange road precincts and magisterial districts;[2] direct assistance to be given to the poor;[3] appoint commissioners to locate mill dams;[4] determine election contests;[5] authorize the choice of additional justices or constables in any magisterial district;[6] provide a standard of weights and measures;[7] and appoint registrars and judges of election for towns.[8]

Besides these and some other duties, it is interesting to observe that a peculiar function of the former justices has survived to our own times. It is provided that "the county court of every county . . . in which the records of deeds and wills have been lost or destroyed, . . and the courts of such other counties as may deem it necessary, shall divide their counties into so many precincts as to them shall seem most convenient, for processioning the lands of all persons" in such counties or parts of counties, "as to such courts may seem proper." Moreover the court is required to "appoint three or more intelligent honest freeholders" of every precinct, to see such processioning performed and to make return of every person's land processioned and "of the persons present at the same." But the processioners may employ a surveyor when they deem it necessary.[9]

The administration of the highway law is divided about equally between the two bodies. Thus the supervisors may appoint the local road surveyors; levy taxes for road purposes; and prescribe rules and plans for keeping the roads in

[1] *Code of Va.*, 1887, p. 251.

[2] *Code of Va.*, 1887, p. 247. For the purpose of rearranging road precincts commissioners are appointed by the court: *Ib.*, 295.

[3] *Code of Va.*, 1887, p. 266.

[4] *Code of Va.*, 1887, p. 368.

[5] *Code of Va.*, 1887, p. 104.

[6] *Code of Va.*, 1887, p. 89.

[7] *Code of Va.*, 1887, p. 488.

[8] *Code of Va.*, 1887, p. 299.

[9] *Code of Va.*, 1887, pp. 587–8.

repair.[1] But new ways are laid out under direction of the county court.[2]

We shall not be able to gain a clear conception of the complexity of the Virginia system, without noticing the manner of making the assessment. This business is entrusted in each county to the so-called "commissioners of revenue." Formerly these were nominated by the state auditor;[3] but by the present law they are chosen by popular vote as in early days.[4]

The general assessment of property is made by the commissioners; but the valuation of lands is taken for them by other officers. The present statute provides that the attorney, the judge, and the clerk of the court in each county, shall constitute a board, who shall in 1890 and every fifth year thereafter, appoint as many assessors as there are commissioners of revenue, to assess the cash value of all lands and lots in the county.[5] And the valuation thus fixed is accepted by the commissioners in making the general assessment.[6]

The clerk of the county court,[7] the sheriff, and treasurer are now elective; but the superintendent of schools is appointed

[1] *Code of Va.*, 1887, pp. 286–9.

[2] *Code of Va.*, 1887, p. 282 ff. The court appoints viewers in the case of altering or establishing highways, and commissioners to assess the damage caused thereby. It may also authorize the construction of tram roads, landings, and wharves: *Ib.*, 293.

[3] *Acts of the Assembly*, 1869–70, pp. 46–54. Commissioners of revenue, so-called, to be appointed by the county court, appear to have been created in 1786: Hening, *Statutes*, XII, 243 ff. But these were an outgrowth of the "commissioners of the tax" introduced by an act of 1777; and the latter were elected annually by the "freeholders and housekeepers" of the county: *Ib.*, IX, 351. The office is also elective by the constitution of 1851: Art. VI, § 30: Poore, *Charters*, II, 1935.

[4] The number varies from 1 to 4; and when a county has several, they are elected for districts: *Code of Va.*, 1887, pp. 172 ff., 88.

[5] *Code of Va.*, 1887, p. 167.

[6] *Code of Va.*, 1887, p. 173.

[7] The clerk of the county court is *ex officio* clerk of the circuit court in counties with a population of less than 15,000; elsewhere the offices are distinct: *Code of Va.*, 1887, p. 88.

by the state board of education;[1] the land surveyor and the superintendent of the poor, by the county judge;[2] the coroner, by the governor from a double number nominated by the county court;[3] and the county judge, by a joint vote of the two houses of the general assembly.[4] The latter holds his office for six years. The sheriff, it may be noted, continued to act as collector and custodian of the county funds until 1870, when the treasurership was created.[5]

(c).—*Rise of Democratic County Government in other States of the South.*

Elsewhere in the southern and southwestern states county organization has developed along the same lines as in Virginia. Everywhere there is a tendency to introduce the elective principle and to lodge the administration of finance in the hands of a county board. But there is much variation in the degree of development and in constitutional details.

Maryland has elective county commissioners with the usual powers; and there the judicial functions of the old justices' tribunals are relegated to the circuit court, which holds at least two terms annually in each county, and "when in session is styled the county court."[6]

In Delaware, as elsewhere shown,[7] the old levy court, composed of commissioners elected in the various hundreds, still manages the county affairs. The treasurer is nominated by the commissioners; but the sheriff and coroner are chosen by ballot.[8]

[1] *Code of Va.*, 1887, p. 388.

[2] *Code of Va.*, 1887, pp. 88–9. But they are nominated on recommendation of the board of supervisors.

[3] *Code of Va.*, 1887, p. 270.

[4] *Code of Va.*, 1887, p. 731; Const., Art. VI, § 13: *Ib.*, 42.

[5] See the notes by Mr. Munford in the *Code of Va.*, 1873, pp. 90, 87.

[6] Wilhelm, *Local Inst. of Md.*, 92–3.

[7] See Chap. V, iv, (c).

[8] Const., Art. VII: *Laws of Del.*, 1874, p. xli.

Alabama has adopted a commissioner system, with elective officers;[1] and her free county government is similar to that of many western states. In Mississippi all the principal county officers are chosen by the people; and the board is composed of five supervisors elected each for a particular district every two years.[2] And every county in Arkansas has three commissioners chosen in the same manner.[3] Similar powers are exercised by the commissioners' court in Texas;[4] while in Louisiana the administrative area is styled a parish; but its organization is on the general model of the county elsewhere in the South.

Three county commissioners are elected biennially in South Carolina, with jurisdiction over roads, bridges and ferries, and in all matters relating to taxation.[5] Moreover in this state a singular plan for taking the assessment has been adopted. For each county the governor, with the approval of the senate, appoints an auditor to whom the general management of the assessment is given.[6] But the work of assessment is performed in each township or tax district by a board of three assessors nominated by the auditor. The town board chooses its own chairman; and the chairmen of all the town boards of the county constitute the county board of equalization. The president of the latter body is the county member of the board of equalization for the state.[7]

But it is in North Carolina that the ancient constitution of the southern county survives with greatest tenacity. Here

[1] *Code of Alabama*, 1886, I, 123, 253 ff. But the county board is styled the "court of county commissioners," and is composed of the probate judge and four other members: *Ib.*, 240. This plan is similar to that existing in Oregon: see Chap. X, III, (*a*).

[2] Const., Art. VI, § 20: *Code of Miss.*, 1880, pp. 29–30, 77.

[3] *Arkansas Digest*, 1874, p. 235.

[4] *Revised Statutes of Texas*, 1879, pp. 156 ff.

[5] *General Statutes of S. C.*, 1882, pp. 183 ff.

[6] *General Statutes of S. C.*, 1882, p. 84.

[7] *General Statutes of S. C.*, 1882, pp. 93–4.

new methods have been introduced without abrogating the old. Each county has a board of from three to five commissioners; but they possess little independent power. They are appointed biennially by the justices, with whom they are required to meet in joint session. The commissioners may audit claims and accounts, and they have the management of highways.[1] But they may levy taxes only with assent of a majority of the justices.[2] The officers are all elective,[3] except the judges of the inferior court and the superintendent of schools: the former[4] are appointed by the justices; and the latter,[5] by the justices acting jointly with the county board of education.

Among the officers of the North Carolina county two primitive functionaries have survived. These are the processioner and the ranger; but the former is now an ordinary land surveyor, whose principal duty is the determination of disputed boundaries;[6] while the duties of the ranger as recorder of strays devolve *ex officio* upon the register of deeds, and, in every township, upon the justices of the peace.[7] In this state, likewise, the sheriff retains his ancient character as a fiscal officer. He is the collector of taxes; and the justices, whenever they see fit, may abolish the office of treasurer and vest its duties in the sheriff.[8] And, finally, it may be noted that the constitution of the county of North Carolina has been reproduced in Tennessee, whose territory long formed a part of the dominion of the older commonwealth.[9]

[1] *Code of N. C.*, 1883, I, 287–92, 773, 777, 781, etc.

[2] *Code of N. C.*, 1883, I, 312.

[3] *Code of N. C.*, 1883, II, 177.

[4] *Code of N. C.*, 1883, I, 315.

[5] The commissioners are constituted the board of education: *Code of N. C.*, 1883, II, 135, 137–8.

[6] *Code of N. C.*, 1883, I, 728–30.

[7] *Code of N. C.*, 1883, II, 569 ff.

[8] *Code of N. C.*, 1883, I, 290, 304.

[9] See the interesting sketch of local government in North Carolina and Tennessee, in Phelan's *History of Tennessee*, 203–14.

VI. The Elective County Board a Survival of the Shiremoot.

At the close of the last chapter it was pointed out that the county courts of the colonial era were the representatives of the English quarter sessions; and that the earlier shiremoot had survived in the electoral assemblies. Now, however, with the results of another century's history before us, we are able to see that already in that period a process had begun which has finally resulted in a more complete restoration of the ancient body. And here we encounter a most remarkable example of the alternate integration and differentiation of institutional organisms. Mr. Freeman has shown us that the English monarchy ends, as it began, with the acknowledged source of its authority in the will of the people.[1] In a manner somewhat analogous, the "cycle has come round" in the government of the shire.

There was first a long era of gradual dissolution. We have already seen how, after Edward I, the functions of the county court slowly decreased in importance; and how, after Edward III, the justices of the peace in their various capacities absorbed all of its remaining administrative powers, while receiving back more than the original criminal jurisdiction which the court had surrendered to the royal judges.[2] But it was not without regret that the democratic constitution of the shire was overthrown. In the seventeenth century, we find writers lamenting the neglect of the *curia comitatus* and pleading for its restoration.[3]

[1] *Growth of the English Constitution*, particularly, pp. 144–59.

[2] See Chap. VI, v.

[3] See, for example, the little treatise printed in London during the Protectorate, 1657, entitled *Curia Comitatus Rediviva, or the Pratique Part of the County Court Revived.* In his preface the author, W. Greenwood, evidently a young lawyer, thus addresses the reader: "Considering the utilitie and profit a peece of this nature would produce to the Countrey, prest me forwards (out of profound and authentick Authors) to demonstrate the anti-

But that restoration was to be first realized on American soil. And the process by which it has been accomplished is precisely the reverse of that which has just been described. Now it is the justices' court which gradually decays, giving up its civil authority to the people's representatives. Everywhere, in the beginning, we behold the same phenomenon. In New York and Pennsylvania, in early Michigan and the Northwest Territory, in Massachusetts and the southern states, a dual authority arises. On the one hand there is a popular board, whose powers slowly expand; on the other a court, whose members are usually nominated by the central authority, and whose functions tend more and more to become strictly judicial. Furthermore it is significant that, in almost every instance, it is the management of finance of which the quarter sessions are at first wholly or in part deprived. And thus, in the county as in the nation, the revival of popular government has its genesis in the control of taxation.

The highest results of this process of readjustment have been attained in the West.[1] Here the quarter sessions have been dissolved; yielding their judicial authority, partly to the county judge, and partly to the circuit or district court.[2] The fiscal board, on the contrary, has absorbed all of the general

quitie, justness, and Iurisdiction of this Court; for the more the Country knows it, and the practice thereof, the more they will love and affect it." And elsewhere he adds: "This Court continuing (untill the time of William the Conqueror, and ever since during the times and raigns of the antient Kings) and doth yet continue (in manner) the same forme, and substance that it then was, . . . the Pleas ought no more to be taken from it, now in our dayes (without cause) than they ought then to have been," etc.: *Curia Com. Red.*, 4–5. The work contains a full discussion of the officers, jurisdiction, and procedure of the court, with citations from the early statutes.

[1] But similar results have been already reached in New England; while throughout the south the process is fairly begun, and in some instances it is far advanced.

[2] The circuit or district court is the American counterpart of the ancient *plenus comitatus*, or full county court held by the royal justices.

civil powers of the county. It is the legal center of the corporate life. And while its leading functions are immediately inherited from the quarter sessions, it is nevertheless historically connected with that body only by irregular filiation. For its constituent principle and its essential attributes are those of the shiremoot, though its form may be widely different. Its authority still flows from the popular will; but it is now strictly representative, having freed itself from the intermixture of feudal elements. It retains a vestige of its judicial character, since appeal from its orders lies to the higher courts. And when composed of the town-reeves or supervisors, the resemblance to its prototype is indeed striking. Then it becomes a deliberative local council, invested with restricted legislative powers.

Thus the restoration of local self-government has at length been accomplished. And it is with intense interest, at this moment, that the American student looks toward the mother country, where by act of Parliament the quarter sessions, after five hundred years of uninterrupted sway, are surrendering a portion of their administrative authority to "county councils" chosen by the people.[1]

[1] Cf. Bryce, *The American Commonwealth*, I, 583. The work of Mr. Bryce, which I have received while preparing these last pages, contains two valuable chapters on town and county government in the United States: Vol. I, 561–92. But scant justice is done to the use made of representation under the western township-county systems. See, for example, Vol. I, 571, 586, 591. The Local Government Act of 1888 takes effect April 1, 1889. The new county council is composed of members chosen by the people for parts of the county called "electoral divisions." See Chambers, *A Popular Summary of the Law relating to Local Government*, London, 1888.

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